THE
Attorney's Practice
IN THE
Court of King's Bench:
OR, AN
INTRODUCTION
TO THE

KNOWLEDGE of the PRACTICE of that Court, as it now ſtands under the Regulation of ſeveral late ACTS of PARLIAMENT, RULES, and DETERMINATIONS of the ſaid COURT;

WITH

Variety of uſeful and curious PRECEDENTS in *Engliſh*, ſettled or drawn by Counſel; and a Complete INDEX to the Whole.

By ROBERT RICHARDSON, of the *Inner Temple*, Gent.

The Fifth Edition, with large Additions.

In TWO VOLUMES.

VOL. I.

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Printed by His Majeſty's Law-Printers;

For J. WORRALL, W. STRAHAN, W. JOHNSTON, P. URIEL, W. OWEN, and W. FLEXNEY. 1769.



THE

PREFACE.

MOST of the modern books upon this ſubject being but mere copies, or bad tranſlations of old ones, long ſince grown obſolete by the variation of practice, with the addition only of a few rules of court, or the abſtract of an act of parliament injudiciouſly inſerted, have, inſtead of ſhewing the young practicer the plain and direct way, led him quite contrary, and ſo far from giving him any inſight into the

practice of the court, that they have puzzled and confounded his judgment by the tranſcribers handing down rules and methods of practice as long ſince out of uſe as the books from which they were copied; ſo that many choſe rather to inquire the way of paſſengers than follow ſuch blind leaders. Beſides, moſt of the antient books of practice were wrote by attornies or practicers in the court of *Common Pleas*, who being almoſt as little acquainted with the practice of this court, as the modern editors of thoſe books ſeem to be with the practice of either court, wrote but ſparingly on this head; ſo that if the practice of this court, as publiſhed in thoſe books, was the practice at this day, their account of it is by no means copious enough to give a young attorney

ney a ſufficient inſight into the practice of a court ſo extenſive in its juriſdiction as the court of *King's Bench* is. Theſe reaſons occaſioned the publication of the firſt edition of this work, in which the author with great labour ſeparated the modern from ſuch of the antient practice of the court as was then out of uſe: He confined himſelf to ſuch rules of the court as were then in force, and to ſuch acts of parliament and adjudged caſes as related to the then practice of the court; whereunto he added ſuch obſervations as he himſelf had made in the courſe of many years practice, and which he had reaſon to hope would not be thought an unacceptable part of the work: He alſo added ſuch precedents as were of frequent uſe in the practice, and which were for the greateſt

greateſt part drawn by the moſt eminent pleaders.

The great and uncommon ſucceſs the former editions of this work met with, being approved of by the moſt experienced practicers of the court, and commended as the moſt uſeful book hitherto publiſhed upon this ſubject, induced the author to undertake the publiſhing this fourth edition, wherein he has taken notice of ſuch variations in the practice as have happened ſince the printing of the laſt edition, and inſerted a great variety of uſeful notes and obſervations on the practice.



THE Attorney's Practice IN THE Court of King's Bench.

Of the juriſdiction of the court.

THE court of *King's Bench*, ſo called, for that the king is ſuppoſed by the proceſs of the court to ſit there, as he formerly did, conſiſts of a chief Juſtice created by writ, and three other judges created by letters patent. *Judges of the Court; How created.*

By the *ſtat.* 20 *Ed.* 3. *c.* 1. the king's juſtices are to take no fee but of the king.

And by the *ſtat.* 12, 13 *W.* 3. *c.* 2. the judges commiſſions are to be made *quamdiu bene ſe geſſerint*, and their ſalaries aſcertained and eſtabliſhed; but upon the addreſs of both houſes of parliament they may be removed. *Their commiſſions* quamdiu bene ſe geſſerint. See *Cro. Car.* 1, 2.

At the common law the patents of the judges were determined by the demiſe of the king; but by *ſtat.* 7, 8 *W.* 3. *c.* 27. §. 21. and *ſtat.* 1 *Ann. ſtat* 1. *c.* 8. §. 1, 2. no pa- *Forteſ. Rep.* 389. 2 *Ld. Raym.* 747. *Atk. Rep.* 213.

tent or grant of any office civil or military, ſhall ceaſe, or be void, by reaſon of the demiſe of the king; but every ſuch patent or grant ſhall remain in force for the ſpace of ſix months next after ſuch demiſe, unleſs in the mean time ſuperſeded or made void by the next and immediate ſucceſſor to the crown.

By *ſtat.* 1 *G.* 3. *c.* 23. judges are continued in the enjoyment of their offices during their good behaviour, notwithſtanding any demiſe of the crown.

In vacation, a judge at chambers may make an order, that the defendant ſhall plead ſuch a plea as he will ſtand by. 2 *Bur. Rep.* 782.

Their power. The judges of this court are the ſovereign juſtices of oyer and terminer, gaol-delivery, and of eyre, conſervators of the peace, and the ſovereign coroners of the land. 4 *Inſt.* 73. 9 *R.* 118. *b.*

Juriſdiction of the court. The juriſdiction of the court is general, and over all *England*; it hath juriſdiction in criminal and civil cauſes, and accordingly is divided into a crown-ſide and a plea-ſide.

Crown ſide, The crown-ſide originally takes cognizance of all treaſons, felonies, miſdemeanors tending to breach of the peace, or oppreſſion of the ſubject, and of all cauſes proſecuted by way of indictment, inquiſition, or information. Into this court indictments from all inferior courts, and orders of ſeſſions, *&c.* may be removed by *certiorari*; and a reſcous may be returned by the ſheriff; inquiſitions of *felo's de ſe*, or *per infortunium interfect'*, are certified hither of courſe. Hence alſo iſſue attachments for diſobeying rules or orders of the

the court, concerning which the party ſhall be examined upon oath to interrogatories; and if guilty, ſhall be fined, and if innocent, diſcharged.

This court, being a ſupreme court of oyer and terminer, gaol-delivery, and eyre, ſuſpends the power of all other courts of the ſame nature, in the ſame county wherein it ſits, during the ſitting thereof. 4 *Inſt.* 73.

Plea-ſide.

On the plea-ſide, it hath conuſance in all pleas, by bill of debt, detinue, covenant, account, and of all actions on the caſe, either upon promiſe, ſcandalous words, nuſances, trover and converſion, or penal ſtatutes, and all other perſonal actions, ejectment, *&c.* againſt any perſon ſuppoſed to be in the cuſtody of the marſhal; and in all perſonal actions for or againſt any officer, miniſter, attorney, or clerk of the court. Theſe officers, if they are ſued in any other court, muſt have the privilege of this court in reſpect of their neceſſary attendance here. This court alſo may hold plea, by original writ out of *Chancery*, of all treſpaſſes on the caſe, treſpaſſes *quare vi & armis*, replevins, *quare impedits*, *&c.* but, as it is ſaid, not in debt, detinue, covenant or account.

May examine errors in other courts,

This court may alſo regularly examine all and all manner of errors in fact and in law, of all judges and juſtices in their judgments, proceſſes and proceedings in courts of record, not only in pleas of the crown, but in all pleas real, perſonal and mixt (the court of *Exchequer* excepted); it may reverſe a judgment given in the *King's Bench* in *Ireland*.

except Exchequer.

May reverſe judgment of the King's Bench *in* Ireland,

May puniſh inferior magiſtrates.

This court may alſo puniſh any inferior magiſtrate or officer of juſtice, for wilful or corrupt abuſe of his authority.

This court may not only correct errors in judicial proceedings, but other errors and miſdemeanors extrajudicial tending to the oppreſſion of the Subject. 1 *R. Raym.* 6. 11 *Co.* 98. *Bagge*'s Caſe.

Grants habeas corpus's.

It grants *habeas corpus's* to relieve perſons wrongfully impriſoned; for upon return of the cauſe they may be bailed or diſcharged.

Mandamus's *and* prohibitions.

It grants *mandamus's* to inferior courts to command them to do their duty, and *prohibitions* to keep them within their proper juriſdictions.

Writ of error from this court muſt be returnable in parliament, if by original. If by bill, in the Exchequer chamber.

The errors of this court cannot be reverſed but in the houſe of lords, except in ſome caſes, where the action is firſt commenced in the court of *King's Bench*, (and not by original out of *Chancery*) according to the *ſtat.* 27 *Eliz. c.* 8. by which ſtatute the error may be examined in the *Exchequer chamber*, but thence too it may be removed into parliament.

Officers of the Court of King's Bench.

Crown-ſide.

ON the Crown-ſide.

Maſter of the crown office.

The * king's coroner and attorney in the court of *King's Bench*, commonly called the clerk of the crown, or maſter of the crown-office in the court of *King's Bench*, now *James Burrow* Eſq; holds his place for life by letters patent under the great ſeal of *Great Britain*.

His Appointment.

Duty.

He has the cuſtody of all the records in his office. He is to attend the court when ſitting, and at his office every afternoon in term-time, and every morning and afternoon in the vacation; he iſſues out the proceſs of the court on the crown-ſide; examines and reports all matters referred to him by the court, or by any judge of the court; enters the award of the ſeveral proceedings of the court, by marking them upon the king's rolls, and other records, of which he has the cuſtody; taxes coſts, and ſettles attornies bills, when referred to him; nominates all ſpecial juries on the crown-ſide; takes recognizances from the proſecutors of informations; takes an inquiſition upon the death

* The office of king's coroner and attorney being granted to one *Vinter*, who was never exerciſed in the office, the judges held, that the patent was void, and refuſed to admit him, for the benefit of the king and his people, and after ſignified his diſability to the king, and recommended another to him as ſufficient, whom the king *ore tenus* commanded them to admit and ſwear. *Dyer* 150.

death of any priſoner dying in the *King's Bench* priſon; and does all other acts himſelf, or his ſubſtitutes, incident to the ſaid office, as are ſet forth under the ſeveral accounts of the duty of his clerks and ſubſtitutes aftermentioned.

Secondary.

Appointment. The ſecondary in the crown-office, *Henry Athorpe* Eſq;

Duty. He is appointed by writing under the hand and ſeal of the clerk of the crown.

He is to make up a general docket every term of all the proceedings on the crown-ſide; to collect, number, and ſort the rolls; to make up every iſſuable term an eſtreat of paper of all fines, amerciaments and recognizances forfeited to the crown, and to ingroſs and deliver the ſame over a week before the end of the term to the *cuſtos brevium*; to draw up paper books in cauſes where there are ſpecial pleadings; to give certificates of perſons having taken the oaths to the government, and to aſſiſt the clerk of the crown in the execution of his office by attending the court; to adminiſter the oaths taken to the government, upon trials at bar on the crown-ſide, upon the arraignment of priſoners, and upon the day the grand jury receive their charge; and by doing ſuch other of the duty of the clerk of the crown as he requires to be done by his ſecondary.

Clerks of the crown-office.

The clerks of the clerk of the crown, commonly called the clerks of the crown-office, *Henry Athorpe* Eſq; *Francis Barlow* Eſq; *Henry Maſterman* Eſq; Mr. *William Hughes*, Mr. *John Wace*, and Mr. *Thomas Benſon.*

They

They are admitted by writing ſigned by the clerk of the crown for the time being, for their ſeveral and reſpective circuits or diviſions, by his ſubſcribing his name to an entry of an appearance by each clerk; and alſo to a particular of the counties, cities and towns allotted to ſuch clerk for his circuit or diviſion. *Appointment.*

Theſe clerks in their reſpective circuits or diviſions are to make dockets of the proceedings in every cauſe ariſing within their ſeveral circuits or diviſions; to make a general comptrolment or abſtract of the pleadings or proceedings; to enter upon record all their proceedings at large; to inrol pardons, grants of deodands and felons goods, and to make out all ſpecial writs and other proceſs iſſuing out of the ſaid court on the crown-ſide. *Duty.*

The clerk of the rules on the crown-ſide, *Francis Barlow* Eſq; *Clerk of the rules on the crown-ſide.*

He is appointed for life by writing under the hand and ſeal of the clerk of the crown. *Appointment.*

He is to take minutes of all the rules on the crown-ſide; to draw up and enter the ſame in a book kept in the ſaid office for that purpoſe, and to make copies thereof when required; to file and copy affidavits in cauſes on the crown-ſide, (which duty formerly belonged to the ſecondary); to make a paper of all cauſes that are ſet down for argument, and to deliver a copy to each judge of the court. *Duty.*

The examiner of the crown-office, Mr. *Thomas Benſon.* *Examiner in the crown-office.*

He is verbally appointed by the clerk of the crown. *Appointment.*

Duty. He files all interrogatories exhibited in the court againſt perſons for contempts, and examines them thereon, and makes copies of ſuch interrogatories, and the examinations thereon when required, and inrols the ſame; and if the parties do not attend to be examined, he certifies their defaults.

Calendar keeper. The calendar keeper of the crown-office, Mr. *Thomas Benſon.*

Appointment. He holds his office by verbal appointment of the clerk of the crown.

Duty. He is to make an abſtract every term of the indictments, informations, convictions and inquiſitions on the rolls of the ſaid office, called the bag-rolls; to award proceſs againſt coroners for defects in their inquiſitions, and to amend ſuch defects.

Clerk of the grand juries. The clerk of the grand juries, Mr. *Joſeph Smith.*

Appointment. He holds his place for life by written appointment under the hand of the clerk of the crown.

His duty is to make out a precept to the ſheriff of *Middleſex* to ſummon the grand juries; to call over the juries; to record their ſeveral appearances, defaults, and their being ſworn; to make out warrants to the high conſtables within the hundred of *Oſſulſton*, directing them to ſummon their petit conſtables to appear before the grand jury of that hundred to make their preſentments; to call over the petty conſtables within the ſaid hundred, and to mark their ſeveral appearances, and file ſuch preſentments as they ſhall make;

make; and draw and ingroſs indictments on ſuch of them as are indictable.

On the plea-ſide is *Plea ſide.*

The office of * chief clerk, who is ſtiled *Chief clerk.* in the records of the court *capitalis clericus domini*

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* *Placita coram dom. rege apud Weſtm. termino ſanctæ paſchæ anno regni domini noſtri Caroli dei gratia Angliæ, Scotiæ, Franciæ & Hiberniæ regis, fidei defenſoris, &c. decimo tertio. Teſte* J. Bramſton. *Rot.* 420.

Angl. ſſ. Memorandum quod die lunæ prox. poſt tres ſeptiman. paſchæ iſto eodem termino coram dom. rege apud Weſtm. ven. Rob'tus Henley, Ar. & Samuel Wightwick, Ar. capital. clerici domini regis ad placita in cur. ipſius domini regis coram ipſo rege irrotuland. aſſign & protuler. hic in cur. quandam petitionem ipſor. Rob'ti & Samuelis ſereniſſimo domino Carolo nunc regi Angl. exhib. et pet. quod petitio illa *unacum beneplacito ipſius* domini regis ſecundum mandat. ejuſdem domini regis irrotularetur, & irrotulatur in hæc verba, ſſ. To the king's moſt excellent majeſty—The humble petition of *Robert Henley* and *Samuel Wightwick*, your majeſty's chief clerks for the inrolling of pleas before your ſacred majeſty to be holden. Whereas your majeſty hath been graciouſly pleaſed *to ſettle* your petitioners in the office of chief clerks of your majeſty's court of *King Bench*, and have *confirmed* the right of the ſame place *with a privy ſeal*, declaring your majeſty's pleaſure, that none ſhould preſume to move your majeſty in any thing contrary to the ſame, and that if any of that nature ſhould be attempted to paſs, the attorney and ſolicitor general ſhould inform the chief juſtices that they might inform your majeſty, and that if any ſhould paſs the great ſeal, the judges ſhould inform your majeſty before they ſuffer the execution thereof as followeth in *the privy ſeal annexed*, which was according to the declaration made by your majeſty's late father, of ever bleſſed memory, which is likewiſe *annexed*; notwithſtanding which many *ſuits have been*,

and

domini regis ad placita in curia ipsius domini regis coram ipso rege irrotuland. assignatas, is now

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and *are daily set on* foot against the petitioners said office, and your majesty hath been troubled with many *petitions*, and several *references* gotten concerning the writing of Latitats, the filing of declarations and *marking the day of filing them*, the filing of Affidavits, the *performing of all ministerial services upon writs of error*; and notwithstanding your majesty's gracious and royal intention, and meaning of your said late royal father by the said two privy seals declared, and that by the certificate and advice of the Right Hon. the now Lord Keeper, and the late Lord Treasurer *Weston*, inrolled by your majesty's express command to prevent your majesty's further trouble by suitors in this kind; by which certificate it appears that the principal of the said several suits concerning the making of latitats and other writs, are neither fit for your majesty to grant, *nor are grantable by law*; yet if any thing should pass the great seal in prejudice of the said office, it might greatly trench and be to your majesty's wrong and loss whensoever it should fall into your majesty's gift; and seeing it would avoid all such like inconveniences, if the fees, and all the services and businesses to the said office belonging or therewith used and enjoyed by any your petitioners predecessors and their clerks, were by express words in particular granted unto your petitioners; may it therefore please your most excellent majesty to give your royal directions, that the privy seal of the tenth of *December* in the 5th year of your reign first above mentioned, may pass the great seal, and that the lord chief justice of your majesty's court of *King's Bench* for the time being may from time to time examine the particulars, rights, services and fees belonging to your petitioners office, or used and enjoyed by the petitioners, their predecessors or any their clerks; and that the lord chief justice for the time being may from time to time make certificate of the same to your majesty's attorney general or solicitor general for the time being, who may upon every such certificate prepare one or more warrants for your majesty's royal signature to pass the said rights, services and fees in particular, and by express words unto your

now exercised by *William Lee*, Esq;

This

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your petitioners and the survivor of them, under *the great seal*, and that any such certificate from any lord chief justice may be the discharge of any reference from your majesty obtained or to be obtained, for as much as shall be in any of them certified respectively, with such clauses to be inserted in any of the said warrants, as your majesty's attorney or solicitor general for the time being shall think fit to establish in peace the particular rights, services, fees and usages of the petitioners said office, to the petitioners and to the survivor of them, and to preserve inviolable your majesty's declaration in the said privy seal and all the particulars therein contained; and that this petition, and your majesty's answer thereunto, may be inrolled by your majesty's express command; and your petitioners, as in all duty and allegiance they are bound, will daily pray for your majesty.——At the court at *Whitehall*, the 14th of *Feb.* 1636, his majesty is graciously pleased that the *privy seal shall pass the great seal* as is desired, and that the lord chief justice of the *King's Bench* for the time being shall from time to time examine and certify the particulars as is desired in the petition, and that his majesty's attorney or solicitor general for the time being shall upon every such certificate prepare one or more warrants for his majesty's royal signature to pass in particular, and by express words, the rights, services and fees now certified under the great seal unto the petitioners and the survivor of them, with such clauses to be inserted in the said warrants as may best establish in peace the petitioners particular said rights, services, fees and usages, and preserve inviolable his majesty's declaration in his said privy seal, and all the particulars therein contained; and his majesty's further pleasure is, that any such certificate from the lord chief justice of his majesty's court of the *King's Bench* shall be a discharge of any reference now lately granted from his majesty, for so much as shall be in any of them certified respectively touching any of the rights, services or fees of the petitioners said office, and that this petition and his majesty's

Appointment. This office has immemorially been granted for life or lives, by the chief juſtice of this court for the time being. *Show. P. C.* 111.

Duty. The duty of this officer is to iſſue out all the proceſs of the court on the plea-ſide, or in cauſes between party and party, where the proceedings are by bill, to attend the court wherever the ſame is held; to record and enter the rules and orders of the court; to inrol the pleadings and judgments of the court; to file *poſteas* and writs of error, and all ſpecial and common bails; to keep remembrances of all writs and records of judgments, and to do ſuch acts by himſelf or ſubſtitutes, as are hereafter ſet forth to be done by his clerks and ſubſtitutes after mentioned. 1 *Ch. Caſes* 20.

Trin. 36 *H.* 6. *anno dom.* 1458. *Rot.* 36.

An antient ſurrender and grant of the office of chief clerk.

England, to wit. BE it remembered, that *William Sond*, chief clerk of our lord the king to inrol pleas before the king himſelf, on the tenth day of *July* in this ſame term, before our lord the king at *Weſtminſter*, brought here into court a certain ſchedule, and prayed that it might be inrolled, and it is inrolled in this form. *England*, to wit. Be it remembered, that on the tenth day of *July* in this ſame term, in the court of our lord the king

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jeſty's anſwer thereupon ſhall be inrolled by his majeſty's expreſs command, to prevent his majeſty's further trouble by ſuitors in this kind; for which this ſhall be unto them and every of them ſufficient warrant.

Fran. Wyndebanck.

king before the king himſelf at *Weſtminſter*, came *William Sond*, chief clerk of our lord the king, to inrol pleas before the king himſelf, in his proper perſon, and in the ſame court, of his mere and free will, into the hands of Sir *John Forteſcue*, Knight, chief juſtice of our lord the king aſſigned to hold pleas before the king himſelf, (*to whom of right it belongs to give and grant the ſaid office to whomſoever he ſhall pleaſe, whenſoever the ſaid office ſhall be void, during the time in which the ſaid Sir* John Forteſcue *ſhall be chief juſtice of our lord the king, to hold pleas before the king himſelf*) ſurrendered the office, to wit, of chief clerk to inrol pleas before the king himſelf, and that in the ſame court, on the ſame day, wholly reſigned and relinquiſhed to the uſe of *William Brome*, and to the intent that the ſame chief juſtice might grant the ſaid office to the ſaid *William Brome*, and that the ſaid *William Brome* might be admitted into the ſaid office by the ſaid court; which ſaid ſurrender the ſaid chief juſtice forthwith here in court accepts, and the ſaid reſignation and relinquiſhment in the ſame immediately here receives and admits; upon which forthwith here in court, on this ſame day, the ſaid chief juſtice grants the ſaid office to the ſaid *William Brome*, to hold, occupy and exerciſe in the ſame manner and form as other officers have heretofore lawfully held, occupied and exerciſed the ſame; nevertheleſs upon this condition, that if the ſaid *William Brome* ſhall die, living the ſaid *William Sond*, then the ſaid *William Sond* may hold, occupy and exerciſe the ſaid office from the death of the ſaid

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William Brome, in the ſame manner and form in which the ſaid *William Sond* before held, occupied and exerciſed the ſame; and the ſaid *William Brome*, on the ſame day is admitted into the ſaid office by the ſaid court, to hold, occupy and exerciſe the ſame for the term of his life, with all profits, fees and commodities belonging to the ſame office, as freely, and in ſuch manner and form as *J. S. Hugh H.* and the ſaid *William Sond*, or any of them, or any other officer, have heretofore lawfully held, occupied or exerciſed the ſame, and well and faithfully to occupy and exerciſe the ſaid office, is charged and ſworn by the ſaid court, *&c.*

England, to-wit. BE it remembered alſo, that the ſaid *William Brome* on the ſaid tenth day of *July*, in this ſame term, before our lord the king at *Weſtminſter*, brought here into court a certain other ſchedule, and prayed that it might be inrolled, and it is inrolled in this form. *England*, to wit. Be it remembered, that on the tenth day of *July* in this ſame term, before our lord the king at *Weſtminſter*, came *William Brome* in his proper perſon, and acknowledged himſelf to owe to *William Sond* 40 *l.* ſterling, to be paid to the ſaid *William Sond* on the feaſt of St. *Michael* the archangel next to come; and unleſs he ſhall do it, the ſaid *William Brome* wills and grants that the ſaid 40 *l.* be made of his lands and chattels to the uſe of the ſaid *William Sond*, to be levied, *&c.* The condition of the ſaid recognizance is ſuch, that if as long as it ſhall pleaſe the ſaid *William Sond* to ſit in the

the court of our lord the king before the king himſelf, and to continue his perſonal reſidence there ſitting in the ſaid court, the ſaid *William Brome* ſhall permit the ſaid *William Sond* to ſit in the place of the office of the ſame *William Brome*, which is called the office of chief clerk of our lord the king, to inrol pleas before the king himſelf, and to take ſuch profits and revenues of the ſame office during the time in which the ſaid *William Sond* ſhall ſit in the ſaid court in the form aforeſaid, and continue his perſonal reſidence in form aforeſaid, as the ſaid *William Sond* ſhall think proper to receive during that time, then the ſaid recognizance to be void, otherwiſe to continue in full force, *&c.*

Secondary. The ſecondary, or deputy to the chief clerk, now *Thomas Owen* Eſq;

Appointment. He is verbally appointed by the chief clerk.

Duty. He aſſiſts the chief clerk in the execution of his office, by attending the court wherever the ſame is held; and after the riſing of the court he attends at his office in the *Temple* every afternoon in term-time, and every morning and afternoon in the vacation, to ſign judgments, and to examine all matters referred to him by the court, and to make his report thereon to the court; to tax coſts and attornies bills, when referred to him; to take the acknowledgment in court of all deeds to be inrolled, all bails juſtified in court, affidavits ſworn in court; and to charge the marſhal with the cuſtody of all perſons brought into court by *habeas corpus*; to ſwear attornies in open court, and cauſe their admiſſions to be inrolled;

rolled; to discharge recognizances of bail upon the defendant's surrender to the custody of the marshal; to nominate special juries; to record the verdicts of the juries upon trials at bar; to draw up special verdicts found upon such trials, and to make certificates of all judgments to be registered in the counties of *Middlesex* and *York*.

He has the custody of all money paid into court, and for the keeping thereof is paid 20 *s.* for every hundred pounds, and after that rate for every greater or lesser sum; and for every sum under 10 *l.* he is paid 2 *s.* *Pas.* 5 *Jac.* 1.

But this duty is now performed by the signer of the writs, as his deputy.

Clerk of the rules.

The clerk of the rules, Mr. *Thomas Cowper*.

Appointment.

He holds his place for life by appointment in writing under the hand and seal of the chief clerk.

Duty.

He is to attend the court, and take minutes of the rules and orders made by the court in civil actions between party and party, and to draw up the same, and make copies thereof when required; and to file and copy all petitions and affidavits on the civil side, and to draw and ingross assignments of the estate and effects of poor prisoners discharged by an act of parliament made for the relief of debtors, with respect to the imprisonment of their persons.

Clerks of the paper.

The clerks of the paper, Mr. *Edward Benton*, and Mr. *Robert Austen*.

They

They hold this office by writing under the hand and Seal of the chief clerk, for their lives and the life of the longer liver of them. *Appointment.*

They attend the court at *Weſtminſter* every day during the ſitting thereof, and at the *King's Bench* office every afternoon in term-time, they read the rules of court, affidavits, records, deeds, libels, ſuggeſtions, and other matters on the plea-ſide of the court: All ſpecial pleadings on the plea-ſide of the court, in cauſes by bill, are left with the clerks of the paper, who make copies of ſuch ſpecial pleadings, and when iſſue is joined thereon, make up the ſame into paper books, and ſet down all cauſes to be argued in court on writs of error and demurrers, or other ſpecial matters, and deliver a copy thereof to the judges. Theſe officers alſo claim the copying of all ſpecial pleadings, and making up the paper books where the proceedings are by original writ; and in *Michaelmas* term 1734. the court determined the right with them; but it is ſaid they had antiently nothing to do in ſuch caſes; and they do not now claim ſuch right on *ſcire facias*, writs of error, and *audita querela*, which two laſt are always proceedings by original writ. *Vent.* 296. 2 *Mod.* 94. *Duty.*

No attorney or clerk attending here in court ſhall deliver to any attorney or clerk attending here in court, or to any other perſon, or ſhall receive from any attorney or clerk attending here in court, or from any other perſon, any ſpecial plea that ought to be put into the office of the clerk of the paper, or copy of the ſame plea, before the plea is put into the *Attornies not to deliver or receive any ſpecial plea before it be put into the office of the clerk of the paper.*

Copy to be made and ſigned by the clerk of the paper.

office of the clerk of the paper; and ſuch copy, after the plea is put in, ſhall be made by a clerk attending in the ſaid office of the clerk of the paper, and ſigned with the hand of one of the clerks there attending: Penalty for the firſt offence 10*s.* to be paid to the box for the uſe of the poor; for the ſecond offence 20*s.* and for the third offence, to be expelled the court. *Trin.* 2 *Jac.* 1. *Trin.* 16 *Car.* 2. *Mich.* 2 *W.* & *M.*

Note; Mr. *Benton* ſets down cauſes in *Hilary* and *Eaſter* terms; Mr. *Robert Auſten* in *Trinity* and *Michaelmas* terms.

Clerk of the dockets.

Clerk of the dockets, commitments and ſatisfactions, now *Geo. Cayley*, Eſq;

Appointment.

He holds his office for life by appointment under the hand and ſeal of the chief clerk.

Duty.

He makes and keeps an alplabetical docket of the judgments, and all other entries upon record in the ſaid court on the plea-ſide, and enters commitments and ſatisfactions.

Clerk of the declarations.

The clerk of the declarations, now Mr. *Anthony Rymell.*

Appointment.

Is appointed for life by writing under the hand and ſeal of the chief clerk.

Duty.

His duty is to receive, file and pye all declarations and bills in the ſaid court; to ſhew the files to the filacers, clerks, and attornies of the court; to grant certificates to priſoners, to enable them to apply for their diſcharges; to attend at *Weſtminſter*, or on a judge of the court, with the records in his cuſtody, when required; and to attend at the *King's Bench* office for the diſpatch of the ſaid buſineſs.

The

The clerks, filacers and attornies of the court, are to pay to this officer for receiving, filing and keeping the bills and declarations, 2 *s.* at the end of every term. And if any of the clerks, filacers, or attornies, ſhall refuſe to pay the ſame on requeſt, they may be ſuſpended from the privilege of their practice at the diſcretion of the chief clerk or ſecondary. *Mich.* 15 *Paſch.* 19 *Car.* 2.

Clerk of the common bails, &c.

The clerk of the common bails, eſtreats and *poſteas*, now Mr. *Richard Walker*.

Appointment.

He holds his office for life by appointment under the hand and ſeal of the chief clerk.

Duty.

He files all common bails, makes out certificates to the marſhal on the filing common bails for priſoners on orders for their diſcharge; marks *deliberatur* on *poſteas*, eſtreats all amerciaments ſet by the court, and adminiſters the Oath taken of the ſervice of writs according to the late act of parliament.

Signer of the writs.

The ſigner of the writs, Mr. *John Hebberdine*.

Appointment.

He holds his place by parol appointment of the chief clerk.

Duty.

His duty is to ſign all ſignable writs, and to enter the remembrance of them on rolls of parchment; to take and file affidavits to hold to bail; to receive and deliver out writs of error and *certiorari*, and to enter them in a book; to file writs and ſpecial bails; to make copies of writs and affidavits, and to attend the judges when required.

Clerk of the treasury.

The * clerk of the treasury, and *custos brevium & recordorum* of the court of *King's Bench*,

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* Angl. ff. *Pro eo quod offic. clerici thesaurar. & warrant. & custod. record. dom. regis & brevium cur. dom. regis* coram ipso rege co'it. vocat. Bancus regis apud Westm. remanen. in domo thesaurar. dom. regis pertinen. cur. ill. cum omnibus feod. proficuis & commoditat. adinde pertinen. de jure pertin. ordini & dispositioni capitalis justic. ejusdem cur. pro tempore existen. ut inciden. offic. suo ad intentionem quod eadem offic. suppleantur per perit. & sufficien. personas exercere eadem; ordinat. est die sabbati prox. post craft. ascensionis dom. isto eodem termino per totam cur. hic, per & cum consensu prædilecti & fidelis conciliarii dom. regis Johan. Popham milit. capitalis justic. dom. regis ad pl'ita coram ipso rege tenend. quod imperpetuum posthac fu'it officium, quod vocabitur *officium thesaurar. de banco regis, quod h'ebit pro termino vitæ ut pertinen. adinde omnia quæ sunt aut præantea fuerunt in dispositione prædicti capitalis justic. ut pertinen. eidem offic. sive officiis except. warrant. attorn. factur. record. de Nisi prius in com. Midd. & transcript. & certification. super br'ia error. & reception. & filation. de les queritur & attachiament. in eadem cur. & custod sigill. pro bill. Midd. & conservat. record. de attinctur. cum feod. adinde pertinen.* Et quod posthac imperpetuum fuer' *officiar. exercere offic. ill. præd. thesaurar. qui imperpetuum vocabitur clericus thesaurar. de banco regis,* qui h'ebit & gaudebit pro termino vitæ suæ tot. exercic. feod. profic. & commoditat. pertinen. aut usa capiend. cum aut pro eodem (except. feod. & profic. ill. præantea except.) Quod quiden officium clerici thesaurar. cum feod. & profic. adinde pertinen. ut prædicitur semper disponetur per prædictum capitalem justic. pro tempore existen. prout idem vacuum devenerit tal. idon. person. qual. idem capitalis justic. adinde no'iabit & assignabit pro termino vitæ ejusdem personæ sic no'iand. & assignand. quæ quidem persona sic no'iand & assignand. *jurat. fuit in cur. fore inde officiar. congruenter & h'ebit pro termino vitæ suæ reception. & custod. omnium record. & br'ium*

Bench, now *Beverſham Filmer*, Eſq; and *Theodore Johnſon*, Eſq;

C 3 The

& br'ium infra eandem cur. (except. record. de attinctur. warrant. attorn. les queriturs & attachiament. præantea except.) Et h'ebit factur. omnium record. de niſi prius exemplification. cop. record. & certification. inde in cancellar. & cameram ſcacc. (except. record. de Niſi prius in com. Midd. & tranſcript. & certificat. ſuper b'ria de error.) Et quoad reception. intration. & cuſtod. warrant. attorn. officiar. appunctuat. fuerit per capitalem juſtic. pro tempore exiſten. ad exercend. idem, qui imperpetuum vocabitur *clericus warrant.* quod quidem officium cum feod. & profic. adinde pertinen. ſemper fuerit ad diſpoſitionem capitalis juſtic. pro tempore exiſten. quæ quidem perſona ſic nominand. & aſſignand. h'ebit receptionem, intration. & cuſtod. omnium warrant. attorn. in eadem cur. Et quoad factur. record. de Niſi prius in com. Midd. fuerit officiar. ad exercend. idem, qui imperpetuum vocabitur *clericus de Niſi prius in Midd.* Quod quidem offic. cum feod. & profic. adinde pertinen. ſemper fuerit ad diſpoſitionem capitalis juſtic. pro tempore exiſten. & tal. perſon. qual. capitalis juſtic. adinde nominabit & aſſignabit, quæ quidem perſona ſic nominand. & aſſignand. h'ebit factur. omnium record. de niſi prius de Midd. Et quoad tranſcript. & certification. ſuper b'ria de error. officiar. fuerit ad exercend. idem, qui ſemper vocabitur *clericus error'*. Quod quidem offic. cum feod. & profic. adinde pertinen. ſemper fuerit ad diſpoſitionem capitalis juſtic. pro tempore exiſten. tali perſon. qual. idem capitalis juſtic. adinde nominabit and aſſignabit, quæ quidem perſon. ſic nominand. & aſſignand. h'ebit factur. tranſcript. & certificat. ſuper b'ria error'. Et quoad cuſtod. record. de attinctur. ſimiliter ordinat. eſt per eandem cur. quod eadem cuſtodientur in prædict. dom. theſaurar. in pluteo Anglice *a preſs* ſubt. duas ſeras & claves una earundem clavium cuſtodiend. per capitalem juſtic. ejuſdem cur. pro tempore exiſten. et altera per attorn. generalem dom. regis pro tempore exiſten. ea intentione quod eadem ad omnia tempora tuto cuſtodientur. Et quoad reception. & fi-

lacon,

The office of clerk of the treasury and *custos brevium & recordorum*, formerly called the office of *custos brevium & recordorum*, is an antient office, and is an office for life, at the disposal of the lord chief justice of the court for the time being. *Vide* 1 *Lev.* 1.

Appointment. The late Lord *Raymond*, chief justice of this court, by writing under the hand and seal, constituted and appointed the said *Beversham Filmer* and *Theodore Johnson*, and the longer liver of them, to be clerk of the treasury, and keeper of all the king's writs and records of the said court (except the making the records of *Nisi prius* in the county of *Middlesex*, and transcripts and certificates upon writs of error, and receiving and filing of *queriturs* and attachments in the same court, and the keeping of the records of attainder;) to hold for their lives, and the life of the longer liver of them.

Duty.
Lev. 64.
T. Raym. 53.
Sid. 77.
Keb. 288, 346.

This officer has the possession of the treasury of the said court at *Westminster*, and the custody and charge of the records and writs there; before the beginning of every term, he gives notice in writing to one of the judges, whose

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lacon. de les queriturs & attachiament. & custod. sigill. bill. de Midd. similiter ordinat. est, quod fuerit officiar. ad exercend. & custodiend. eadem, qui imperpetuum vocabitur *custos de les queriturs & attachiament.* Quod quidem officium cum feod. & profic. adinde pertinen. semper disponetur per les puisne justic. ejusdem cur. aut majorem numerum eorundem exercend. per talem personam & personas & in talibus modo & forma qual. iidem les puisne justic. aut major numerus eorum limitabunt aut appunctuabunt. *Pas.* 4 *Jac.* 1. *Rot.* 171.

whoſe turn it is to keep the eſſoin, and attends the judge at *Weſtminſter*, with the other officers of the court for that purpoſe; he likewiſe gives conſtant attendance at the treaſury by himſelf or deputy every day in term, during the ſitting of the court, and attends, with the keys of the treaſury in vacation-time, when required, in order to ſearch for, and make copies and exemplifications of records; and at the end of every iſſuable term he tranſcribes from the records all iſſues, fines, amerciaments and recognizances forfeited, which are to be eſtreated into the court of *Exchequer*; he tranſcribes and ingroſſes from the plea-rolls all iſſues that are to be tried by *niſi prius* in the ſaid court, and examines the ſame with the plea-roll, (except as aforeſaid) and after they are examined, ſeals them for trial; and by his clerks he gives daily attendance at his office in *Gray's Inn*, from the time the judges appoint their circuits till the circuits are over, for the tranſcribing, examining and ſealing the records of *niſi prius* for all the circuits in *England*, and for making Exemplifications if required. D. A. 179. p. 1.

Clark of the cuſtos brevium *in the inner treaſury.*

The clerk of the *cuſtos brevium* in the inner and upper treaſury, Mr. *Taverner Wallis*.

Appointment.

He holds his office by verbal appointment from the clerk of the treaſury.

Duty.

He performs the duty of the clerk of the treaſury and *cuſtos brevium* in the inner and upper treaſury.

Clerk of the custos brevium in the outer treasury.

The clerk of the *custos brevium* in the outer treasury, Mr. *Taverner Wallis.*

Appointment.

He is appointed by writing under the hand and seal of the *custos brevium.*

Duty.

He is to perform the duty of the clerk of the treasury and *custos brevium* in the outer treasury, and has the filing and keeping the plea-rolls of the plea-side of the six last terms.

Clerks of Nisi prius.

The clerks of *Nisi prius*, *Beversham Filmer*, Esq; Mr. *Taverner Wallis*, and Mr. *Thomas Whitefield.*

Appointment.

They are verbally appointed by the *custos brevium.*

Duty.

They are as clerks to the *custos brevium*, to transcribe from the plea-rolls all issues to be tried by *Nisi prius* in the respective circuits, and to ingross the *jurata's* thereto; and to make exemplifications thereof, if required.

Signer of the bills of Middlesex.

The signer of the bills of *Middlesex*, Mr. *William Marshal.*

Appointment.

He is appointed in writing by the three puisne judges.

Duty.

He signs all process by bill of *Middlesex*, keeps proper books to enter the same, with alphabets referring thereto, for suitors and others to have recourse to; administers the oaths on affidavits of the causes of Action, and makes alphabets referring thereto; makes copies of such affidavits, and gives certificates when required.

Clerk of the errors.

The clerk of the errors, *John Way*, Esq;

Is verbally appointed by the lord chief juſtice of the court for the time being. *Appointment.*

It is his duty to allow all writs of error directed to the lord chief juſtice of the ſaid court, and brought upon judgments given by the ſaid court in crown as well as in civil cauſes; and upon the allowance thereof to give certificates, and to make out *ſuperſedeas's*, if deſired, immediately where bail is not required; but not till after the bail is complete, where bail is required; to attend the taking of bail, to give rules for better bail; to attend the judges in court with the bail-book upon adding or juſtifying bail; to draw up the recognizances, and enter them on record; to give rules to tranſcribe the records, and indorſe the returns on writs of error; to make tranſcripts of the records; to get the returns ſigned by the lord chief juſtice; and to deliver ſuch writs of error as are returnable in the *Exchequer* chamber, with the tranſcripts annexed to the clerk of the errors of the *Exchequer* chamber; and if the writ of error be returnable in parliament, to carry the writ and tranſcript to the houſe of peers; and in caſes where the records are not tranſcribed, he is to ſign *non pros's* on ſuch writs of error. *Duty.*

The ſealer of the writs. *Sealer of the writs.*

His late majeſty king *Charles* the Second, by letters patent under the great ſeal of *England*, bearing date the 2d day of *June* in the 25th year of his reign, granted to the moſt noble *Charles* late duke of *Cleveland*, then earl of *Southampton*, and his heirs male, in default of iſſue male of lord *George Fitzroy*, *Appointment.*

ſince deceaſed without iſſue male, the receipt, revenue, yearly profits, ſum and ſums of money, and other commodities whatſoever ariſing and to become due and payable for the ſealing of any writs, exemplications, or other things whatſoever uſually ſealed, or that ought to be ſealed with the ſeal or ſeals of his majeſty's courts of *King's Bench* or *Common Pleas*, or either of them; and alſo the offices of receiver general of all the ſaid revenues, profits and ſums of money, and comptroller general of all writs and other things that ſhall or ought to be ſealed with the ſaid ſeals or either of them, and of the ſums of money payable for the ſame. The preſent duke of *Cleveland* came into poſſeſſion of his office by virtue of the ſaid letters patent on the death of his father, the ſaid *Charles* duke of *Cleveland*, and exerciſes the ſame by *Hutton Perkins*, eſq; his deputy.

	l.	*s.*	*d.*
The duke pays to the crown a fee-farm rent of 413*l.* 18*s.* 6*s.* every term, amounting yearly to	1653	14	0

The ſeals office is open

	Morning.	*Afternoon.*
In term-time, for a fortnight after *Hilary* and *Trinity* terms; and for a week after *Eaſter* and *Michaelmas* terms, from	9 to 11	3 to 6
In vacation-time, except as above, from	9 to 11	3 to 5

The

The clerk of the lord chief juſtice for tranſcribing from the plea-roll the records of *Niſi prius*, in the county of *Middleſex*, is *John Way*, Eſq; *Clerk for tranſcribing records of* Niſi prius *in* Middleſex.

This officer is appointed by the chief juſtice of the ſaid court for the time being. *Appointment.*

His duty is to tranſcribe from the plea-rolls the ſaid records of *Niſi prius*, and to examine and ſeal the ſame; and to receive and file the warrants of attorney on the plea-ſide of the court. *Duty.*

The judges clerks. *Judges clerks.*

They are verbally appointed by the reſpective judges whom they ſerve. *Appointment.*

And they are to attend their reſpective judges for the more eaſy diſpatch of ſuch buſineſs as comes before them. *Duty.*

The filacers are Mr. *Adams* and *Theodore Johnſon*, Eſq; *Filacers.*

They hold their places for their lives by appointments under the hand and ſeal of the chief juſtice of the court for the time being. *Appointment.*

Their duty is to write on parchment, and to enter on record all writs of *capias*, *alias*, *pluries*, exigent, proclamation and outlawry, *pone* and *diſtringas*, and all other writs and proceſs founded on original writs out of *Chancery*, returnable in this court, and iſſued before the defendant's appearance; and to enter bails and appearances to ſuch proceſs, and make tranſcripts of outlawries into the *Exchequer*. *Duty.*

Mr.

Mr. *Vaughan* has acted as filacer for the following counties, cities and towns.

Counties of *Bedford*, *Berks*, *Bucks*, *Cambridge*, *Cornwall*, *Cumberland*, *Devon*, *Dorset*, *Hereford*, *Hertford*, *Huntingdon*, *Kent*, *Leiceſter*, *Middleſex*, *Norfolk*, *Northampton*, *Nottingham*, *Northumberland*, *Oxford*, *Rutland*, *Salop*, *Southampton*, *Somerſet*, *Stafford*, *Suffolk*, *Surry*, *Warwick*, *Weſtmoreland*, *Worceſter*, *Wilts*, and *York*.

Cities of *Canterbury*, *Coventry*, *Exeter*, *London*, *Litchfield*, *Norwich*, *Worceſter*, and *York*.

Towns of *Newcaſtle upon Tyne*, *Kingſton upon Hull*, *Nottingham*, *Pool*, and *Southampton*; And

Mr. *Theodore Johnſon* acts as filacer for the counties of *Eſſex* and *Monmouth*.

Uſher and cryer.

Uſher and cryer, (formerly called cryer and porter) now Mr. *John Collier*.

Appointment.

He holds his office for life by letters patent under the great ſeal of *Great Britain*, and executes his office by two deputy uſhers and two deputy criers, whom he appoints by writing under his hand and ſeal for their lives.

Duty.

His duty is to take care that the court room be kept in order; to attend the judges chamber at *Weſtminſter*, the court when ſitting; to make all proclamations that are to be made therein, and to aſſiſt in adminiſtring oaths taken in court.

Deputy court-keeper appointed by the cryer and uſher; and

The

The keeper of *Weſtminſter Hall* appointed by the warden of the *Fleet*. Both theſe perſons claim and take fees from the ſuitors of the court on trials at *Weſtminſter*; but neither of them are apprehended to be officers of the court, and conſequently intitled to no fees.

Marſhal of the King's Bench.

The marſhal of the *King's Bench* Priſon is *John Aſhton* eſq;

Stat. 8 & 9 W. 3. c. 27.

By the *ſtat.* 8 & 9 *W.* 3. *c.* 27. it is among other things enacted, 'That from 'and after the firſt day of *May* 1697. the 'office of marſhal of the *King's Bench* priſon ſhould be executed by the Perſon or 'perſons to whom the inheritance of the 'ſaid priſon, priſon-houſe, lands, tenements 'and other hereditaments of the ſaid priſon 'ſhould then belong, in perſon, or by their 'ſufficient deputy or deputies, for whom 'they ſhould be anſwerable; and the pro'fits and inheritance be ſequeſtered to make 'ſatisfaction for eſcapes, &c.

Appointment.

The ſaid *John Aſhton*, eſq; formerly held this office by leaſe for a certain number of years, determinable on his death, and was admitted by the court upon the ſaid leaſe, and took an oath of office.

But now by the *ſtat.* 27 *Geo.* 2. *c.* 17. the priſon of the marſhalſea of this court, and the ſcite thereof, and the ground and appurtenances thereunto belonging, and the power of granting the cuſtody of the ſaid priſon, and the office of marſhal of the marſhalſea aforeſaid, are veſted in the crown unalienable.

And

And by the ſaid act the ſaid *John Aſhton* eſq; is continued in the ſaid office during ſo long time as he ſhall behave himſelf well therein, and be reſident in the ſaid priſon, or within the rules thereof, and no longer; and after his death, reſignation or amoval, and ſo upon every other vacancy, another officer is to be appointed by the crown to hold in like manner.

The marſhal is to have the appointment of the inferior officers. The marſhal and inferior officers are removable for neglect or miſbehaviour. Perſons ſelling the office of marſhal, or the inferior offices thereto belonging, *&c.* are to forfeit their right in the offices, *&c.* and the purchaſer diſabled to hold. Perſons who had purchaſed any inferior offices, and were in poſſeſſion at the time of the act, are to hold the ſame, giving ſecurity for the execution of ſuch office, and may aſſign the ſame with conſent of the court, *&c.* and the purchaſer ſhall be ſubject to the regulations in this act. *Stat.* 27 *Geo.* 2. *c.* 17.

Duty.

1 Str. 50.

The marſhal is to have the cuſtody of the priſon belonging to the ſaid court, and of all the priſoners committed to the ſaid priſon; and he is to be anſwerable for the eſcape of any priſoner out of his cuſtody; and by himſelf, or his deputy, is to attend the court during the ſitting thereof, and on the chief juſtice whenever his lordſhip appears in his publick capacity. *Vide* 9 *Co.* 95. *Cro. Car.* 587. *W. Jones* 463. 3 *D. A.* 205. *p.* 7.

Deputy marſhal.

The deputy marſhal is Mr. *Henry Jordon.*

This

This office is in the diſpoſal of the proprietors of the inheritance of the *King's Bench* priſon. *Appointment.*

The clerk of the paper of the *King's Bench* priſon is Mr. *E. Morſe.* *Clerk of the paper of the* King's Bench. *priſon.*

This office has been uſually granted for life by appointment in writing under the hands and ſeals of the proprietors of the inheritance of the ſaid priſon. *Appointment.*

He enters the commitments of all priſoners committed to the ſaid priſon, and all declarations and other charges delivered againſt them; as alſo the *committiturs* of all perſons charged in execution; he enters and returns all writs of *habeas corpus* directed to the marſhal and makes out all copies of cauſes and certificates of priſoners detainer. *Duty.*

Chaplain of the *King's Bench* priſon is the reverend *Leonard Howard* D. D. rector of St. *George the Martyr* in *Southwark.* *Chaplain.*

This office has been uſually granted for life by indenture under the hands and ſeals of the proprietors of the inheritance of the ſaid priſon; and is now in the appointment of the marſhal. *Appointment.*

The clerk of the day rules of the *King's Bench* priſon is Mr. *Cotham.* *Clerk of the day rules.*

He holds this office for life, by like appointment, from the ſaid proprietors. *Appointment.*

He is to attend the ſaid priſon in term-time, and draw up and ingroſs the petitions of ſuch priſoners as petition the court for day rules, *Duty.*

and to carry or ſend them to *Weſtminſter* at the ſitting of the Court.

There are alſo two turnkeys.

Tipſtaffs.

Appointment.

The four tipſtaffs, one attending on each judge of the court, are appointed for their reſpective lives by writings under the hands and ſeals of the proprietors of the inheritance of the ſaid priſon.

Duty.

Their duty is to attend on their reſpective judges conſtantly in court, and at their chambers to execute the warrants directed to them; and to take charge of every priſoner committed in court, or by a judge at his chambers; and to deliver ſuch priſoner to the marſhal.

Aſſociate and marſhal at Niſi prius *in* Lond. & Mid.

The aſſociate and marſhal for trials by *Niſi prius* in *London* and *Middleſex*, is *John Way*, Eſq;

Appointment.

He is verbally appointed by the chief juſtice of the court for the time being.

Duty.

He is to attend the chief juſtice at all trials in *London* and *Middleſex*; to enter the cauſes ſet down to be tried; to enter *ne recipiaturs*; to receive the records and writs, and to mark them in order of precedency as they are brought in; to call the cauſes; to receive or withdraw records, and deliver out *poſteas*, and to mark out ſuch records as are left untried.

Clerk of Niſi prius *in* Lond. *and* Middleſ.

The clerk of *Niſi prius* for trials in *London* and *Middleſex* is Mr. *John Minſhull.*

Appointment.

This officer is verbally appointed by the chief juſtice of the court for the time being.

His

His duty is to attend the ſittings, to call the jurors, and mark them ſworn on the panel; and in caſes of ſpecial juries to mark the *tales*, if there be any; to indorſe on the panel the default of the defendant's appearance, and the proclamations made on informations and indictments, and who appears to proſecute for the king; to read the records, and all deeds and other written evidence; to take notes of accounts, and of ſuch other matters as the lord chief juſtice ſhall direct; to take minutes of every ſpecial verdict, and draw up the ſame and make copies thereof, and to take all other verdicts; to indorſe all verdicts, and to record all nonſuits upon the panel; to draw up all certificates to be ſigned by the chief juſtice; to take minutes of all orders made at *Niſi prius*; to draw them up, and make copies thereof; and alſo to take all recognizances entered into at ſuch ſittings; and ſince the late act for the better regulating of juries, he draws the names of the perſons returned to ſerve on juries, marks the names of the perſons ſworn on the panel; takes notice of the names of the defaulters, and their fines for not appearing; and of perſons excuſed or challenged. *Duty.*

The cryer at *Niſi prius* in *London* and *Middleſex* is Mr. *Benjamin Thomas*. *Cryer at* Niſi prius *in* Lond. *and* Middl.

This officer is alſo verbally appointed by the lord chief juſtice of the court for the time being. *Appointment.*

His buſineſs is to attend the court, and make the ſeveral proclamations, and call and *Duty.*

ſwear the juries; to ſwear the bailiffs to prove ſervice on ſuch of the jurymen as are called, and do not attend; to ſwear the witneſſes, and all other perſons who are to be examined in court, and to open and adjourn the court.

Sheriffs.

As to the office of ſheriffs.

Sheriffs to be choſen by the chancellor, &c. on the morrow of All Souls.

Sheriffs are to be ordained yearly on the morrow of *All Souls* at the *Exchequer* by the chancellor, treaſurer and chief baron, taking to them the chief juſtices if they be preſent. *Stat.* 9 *Ed.* 2. *ſtat.* 2. *Stat.* 14 *Ed.* 3. *c.* 7. But before, the people had the election of their ſheriff in every ſhire where the ſhrievalty was not of fee. *Artic. ſuper chart.* 28 *Ed.* 1. *c.* 8. 13.

None to be choſen but ſuch as have lands ſufficient to anſwer.

None ſhall be ſheriff except he have ſufficient lands within the ſhire to anſwer the king and his people. *Stat.* 9 *Ed.* 2. *ſtat.* 2. *Stat.* 5 *Ed.* 3. *c.* 4. *Stat.* 14 *Ed.* 3. *c.* 7. *Stat.* 13 & 14 *Car.* 2. *c.* 21. §. 7.

Sheriff to abide in his bailiwic.

Every ſheriff ſhall abide in perſon within his bailiwic. *Stat.* 4 *H.* 4. *c.* 5.

Sheriff not to tarry in his office above a year.

No ſheriff ſhall tarry in his bailiwic above a year, and then another to be ordained. *Stat.* 14 *Ed.* 3. *c.* 7. *Stat.* 28 *Ed.* 3. *c.* 7. *Stat.* 42 *Ed.* 3. *c.* 9. *Vide infra ſtat.* 23 *Hen.* 6. *c.* 8.

But may act in Michaelmas *term,*

If any ſheriff ſhall execute or return any writ or warrant within *Michaelmas* term, after the 6th day of *November*, and before any writ of diſcharge delivered to him, he ſhall not be damnified by the *ſtat.* 23 *Hen.* 6. *c.* 8. altho' he hath occupied the office before

fore the days of return *Craſtino Martini*, *Octabis Martini*, or *Quinden' Martini*. Stat. 12 Ed. 4. c. 1.

Every old Sheriff ſhall have power, as well to execute and return any writ or warrant, as to execute every other thing which to the office pertaineth, during the terms of St. *Michael* and St. *Hilary*, unleſs he is lawfully diſcharged. *Stat.* 17 *Ed.* 4. *c.* 6. *and* Hilary *term, unleſs diſcharged.*

No under ſheriff, or ſheriff's clerk ſhall abide in his office above one year. *Stat.* 42 *Ed.* 3. *c.* 9. *Vide infra ſtat.* 23 *Hen.* 6. *c.* 8. *No under ſheriff or ſheriff's clerk to abide in his office above a year.*

None that hath been ſheriff of any county a year ſhall be within two years next choſen again, if there be other ſufficient. *Stat.* 1 *Ric.* 2. *c.* 11. *Vide infra ſtat.* 23 *Hen.* 6. *c.* 8. *No ſheriff ſhall within two years be choſen again, if,* &c.

The ſtatutes 14 *Ed.* 3. *c.* 7. 42 *Ed.* 3. *c.* 9. and 1 *Ric.* 2. *c.* 11. ſhall be obſerved in every county (the under ſheriffs and other officers within the city of *London* excepted, and ſuch counties except in which divers be inheritable to the office of ſheriff, and alſo ſuch perſons which have eſtate of freehold in the office of ſheriff); and if any ſheriff or under ſheriff, or ſheriff's clerk, occupy the office contrary to the ſtatutes before recited, he ſhall forfeit 200 *l.* yearly as long he occupieth contrary to the ſaid ſtatutes; the one moiety to the king, the other moiety to him that ſhall ſue. *Stat.* 23 *H.* 6. *c.* 8. *Confirmation of ſtat.* 14 Ed. 3. c. 7. 42 Ed 3. c 9. *and* 1 Ric. 2. c. 11. *except as to* London, *and where the ſhrievalty is inheritable.* *Penalties on ſheriffs,* &c. *holding the office contrary to theſe ſtatutes.*

The under ſheriffs and other officers of ſheriffs of *Briſtol* may occupy their offices from year to year, as the under ſheriffs and other officers of ſheriffs of *London* may do, *Under ſheriffs,* &c. *of* Briſtol *may act from year to year.*

notwithſtanding the acts 42 *Ed.* 3. *c.* 9. and 23 *Hen.* 6. *c.* 8. *Stat.* 6 *Hen.* 8. *c.* 18. §. 3.

Sheriff dying before, &c. the under ſheriff to execute the office in his name until, &c.

If any ſheriff ſhall die before the expiration of his year, or before he be ſuperſeded, the under ſheriff ſhall nevertheleſs continue in his office, and execute the ſame in the name of the deceaſed till another ſheriff be appointed and ſworn; and the under ſheriff ſhall be anſwerable for the execution of the office during ſuch interval as the high ſheriff would have been; and the ſecurity given by the under ſheriff and his pledges ſhall ſtand a ſecurity to the king, and all perſons whatſoever, for the due performance of his office during ſuch interval. *Stat.* 3 *Geo.* 1. *c.* 15. §. 8.

To be anſwerable for, &c.

And his ſecurity to be ſecurity to the king and all perſons, &c.

Office of under ſheriff, &c. not to be bought, ſold or let to farm.

It ſhall not be lawful for any perſon to buy, ſell, let or take to farm the office of under ſheriff or deputy ſheriff, ſeal-keeper, county clerk, ſhire clerk, gaoler, bailiff, or any other officer pertaining to the office of high ſheriff, or to contract for any of the ſaid offices, on forfeiture of 500 *l.* one moiety to his majeſty, the other to ſuch as ſhall ſue in any court at *Weſtminſter* within two years after the offence. *Stat.* 3 *Geo.* 1. *c.* 15. §. 10.

Penalty.

Nothing before in this act ſhall hinder any high ſheriff from conſtituting an under ſheriff or a deputy ſheriff, as by law he may; nor to hinder the under ſheriff, in caſe of the high ſheriff's death, when he acts as high ſheriff, from conſtituting a deputy; nor to hinder ſuch ſheriff or under ſheriff from receiving the lawful fees of his office, or from taking ſecurity for the due anſwering of the ſame;

nor

nor to hinder ſuch under ſheriff, deputy ſheriff, ſeal-keeper, &c. from accounting to the high ſheriff for all ſuch lawful fees as ſhall be by them taken, nor for giving ſecurity ſo to do; nor to hinder the high ſheriff from allowing a ſalary to his under ſheriff, &c. or other officers. *Same ſtat.* §. 11.

A ſheriff's bailiff not to execute that office above one year in 4, except, &c.

They that be bailiffs of ſheriffs one year ſhall be in no ſuch office by three years next following, except bailiffs of ſheriffs which inherit in their office. *Stat.* 1 *Hen.* 5. *c.* 4.

Sheriff to have his deputy in court, and his name and place of abode ſet up in the office.

Every ſheriff ſhall have his deputy in this court to return and receive writs; and every deputy yearly before *Hilary* term ſhall have his name and place of reſidence in *London* or *Middleſex* ſet and continued up in tables in the office of the ſecondary for that purpoſe, upon pain of the under ſheriff's forfeiting for every term that he ſhall make default, the ſum of 20 *l.* *Stat.* 23 *H.* 6. *c.* 10. *Hil.* 21. *Reg. Cur. Paſ.* 23 *Car.* 1. *Mich.* 1654. *Paſ.* 15 *Car.* 2.

No under ſheriff or bailiff to practice as attorney.

No under ſheriff, or bailiff of any liberty, ought to be admitted during ſuch his employment to practice as an attorney, upon pain of excluſion from the employment of an attorney; and not to be re admitted. *Stat.* 1 *H.* 5. *c.* 4. *Reg. Cur. Mich.* 1654. *Stat.* 22 *G.* 2. *c.* 46. §. 14. 2 *Barnard. K. B.* 295. *Wood's Inſt.* 74.

Sheriff, &c. delaying execution, liable to attachment.

If any ſheriff, under ſheriff, or deputy, or bailiff of any liberty, ſhall wilfully delay the execution of any proceſs, or ſhall take or require any undue fees for the ſame, or ſhall give notice to the defendant, thereby to fruſtrate the execution of any writ or proceſs,

or having levied money in execution, ſhall detain the ſame in his hand after the return of the writ, the officer ſo offending is liable to an attachment, information, commitment, or fine, as the caſe may require. *Mich.* 1654.

No warrant before writ ſued out, or any blank warrant, to be allowed.

No ſheriff, or ſheriff's deputy, ſhall make or deliver, or ſuffer to be made or delivered, any warrant or warrants before the writ or writs be duly ſued forth and delivered to him; nor deliver, nor ſuffer to be delivered, any blank warrants to arreſt or attach any perſon. *Eaſt.* 15 *Car.* 2. *Stat.* 43 *Eliz. c.* 6. §. 1. *Stat.* 3 *Car.* 1. *c.* 4. *Stat.* 16 *Car.* 1. *c.* 4. *Stat.* 9 *W.* 3. *c.* 25. *Stat.* 6 *Geo.* 1. *c.* 21. *Dyer* 244.

Copy of inventory to be delivered on requeſt.

Every under ſheriff ought, upon reaſonable notice given to him, to deliver a true copy of the inventory of any goods taken by him upon a *fi. fa.* or *elegit*, to the party requiring the ſame, he paying for ſuch copy not exceeding 3 *s.* 4 *d.*

Warrant to have the ſame day ſet down thereon as ſhall be ſet down on the writ.

Penalty.

Every warrant to be made out upon any writ out of the *King's Bench*, *Common Pleas* or *Exchequer*, before judgment, to arreſt any perſon, ſhall have the ſame day and year ſet down thereon as ſhall be ſet down on the writ itſelf, under the forfeiture of 10 *l.* to be paid by the perſon who ſhall fill up or deliver out ſuch warrant; the penalty to be recovered and divided as the other penalties in 9 *Will.* 3. *c.* 25. §. 42. *Stat.* 6 *Geo.* 1. *c.* 21. §. 54.

Sheriffs to take bail of all perſons in their cuſtody on perſonal actions,

Sheriffs, *&c.* ſhall let out of priſon all perſons in their cuſtody by force of any writ, bill or warrant, in any action perſonal, *&c.* upon reaſonable ſurety of perſons having ſufficient

ficient within the counties, to keep their days, (perſons in ward by redemption, execution, *capias utlagatum* or *excommunicatum*, ſurety of the peace, and all perſons committed by ſpecial commandment of any juſtices excepted); and no ſheriff, nor his officers, ſhall take any obligation for any cauſe aforeſaid, or by colour of their office, but only to themſelves, nor by any perſon, which ſhall be in their ward by courſe of law, but upon the name of their office, and upon condition written, that the ſaid priſoners ſhall appear at the day contained in the writ, bill or warrant; and if any ſheriffs or officers aforeſaid take any obligation in other form by colour of their offices, it ſhall be void. *Stat.* 23 *Hen.* 6. *c.* 10.

except, &c.

and not to take any bond, but to, &c.

If the ſheriffs return upon any perſon *cepi corpus*, or *reddidit ſe*, they ſhall be chargeable to have the bodies at the days of the returns, as before this act. *Stat.* 23 *Hen.* 6. *c.* 10.

It is oppreſſion in ſheriff's bailiffs, to take money for letting perſons out upon bail, and puniſhablle by attachment or indictment. 2 *Bur. Rep.* 926, 927, 928.

It ſhall not be lawful for any ſheriff, under ſheriff, bailiff of liberties, their officers, ſervants or deputies, by colour of their office, to take for the ſerving of any extent or execution upon the body, lands or goods of any perſon, more than 12 *d.* for every 20 *s.* where the ſum exceedeth not 100 *l.* and 6 *d.* for every 20 *s.* above 100 *l.* that he ſhall levy and deliver in execution, or take the body in execution for; upon pain that every ſheriff, *&c.* which ſhall do the contrary, ſhall forfeit to

Sheriffs fees on executions, 12d. for every 20s. where the ſum exceeds not 100l. and 6d. for every 20s. above 100 l. which he ſhall levy or take the body in execution for.

Penalty. the party grieved his treble damage, and ſhall forfeit 40 *l.* the one moiety thereof to the queen, and the other moiety to the party that will ſue for the ſame. *Stat.* * 29 *Eliz. c.* 4. §. 1.

Not to extend to cities, &c. This act ſhall not extend to any fees to be taken for any execution within any city or town corporate. *Same ſtat.* §. 2.

This act ſhall not extend to allow any ſheriff, under ſheriff or other perſon whomſoever, employed in the execution of proceſs, any poundage for the taking the body of any perſon in execution, upon any proceſs at the ſuit of any ſheriff, or other officer of the crown, upon any bail-bond entered into for the appearance of any perſon proſecuted, either for any duties payable to his majeſty, or for any penalty inflicted by any act of parliament for preventing the clandeſtine running or receiving any cuſtomable or prohibited goods, or where the officer executing ſuch proceſs, would not be intitled to poundage, if the proceedings were carried on directly in the name of the crown. *Stat.* 7 *Geo.* 3. *c.* 29.

On writs of ſeiſin or poſſeſſion to take 12 d. *for every* 20 s. *of the yearly rent where the whole exceeds* It ſhall not be lawful for any ſheriff or their bailiffs, or for the bailiff of any liberty, by colour of their office, or by reaſon of their executing any writ of *habere facias poſſeſſionem*, or *ſeiſinam*, to receive any greater fee than 12 *d.* for every 20 *s.* of the yearly value of

* This printed ſtatute is wrong: the parliament was held 28 *Eliz. T. Raym.* 1. *Pl. Com.* 303. *Ander.* 294. *pl.* 303. 2 *Mod.* 242. *Lutw.* 203, 1117. *Skin.* 364.

of any lands, &c. whereof poſſeſſion or ſeiſin ſhall be given, where the whole exceeds not the yearly value of 100*l.* and 6*d.* for every 20*s.* *per ann.* above the yearly value of 100*l.* *Stat.* 3 *Geo.* 1. *c.* 15. §. 16.

not the yearly value of 100l. *and* 6d. *for every* 20s. per ann. *above,* &c.

Poundage in no caſe ſhall be taken for executing of any writ of *capias ad ſatisfaciendum*, or on charging any perſon in execution by virtue of ſuch writ, for any greater ſum than the real debt amounts to; which ſum the plaintiff is to mark on the back of the writ before it be delivered to the ſheriff; and if any ſheriff, &c. ſhall take greater fees, ſuch offender ſhall be adjudged guilty of extortion, injuſtice and oppreſſion; and being convicted ſhall forfeit to the party grieved treble damages, and double the ſum extorted; to be decreed by the court out of which ſuch writ iſſued, on complaint and proof of ſuch extortion before the court, in ſuch ſummary way as to them ſhall ſeem meet; and every perſon ſo offending ſhall forfeit 200*l.* one moiety to the king, and the other to ſuch as ſhall ſue in any court at *Weſtminſter*, provided that ſuch ſuit be commenced within two years after the offence. *Stat.* 3 *Geo.* 1. *c.* 15. §. 17.

On a writ of ca. ſa. *to take poundage only for the real debt, which is to be marked on the back of the writ.*

Penalty.

Per cur. The uſage has been, ſince the *ſtat.* 28 *Eliz.* to take a fee upon a *ca. ſa.* and ſuch a fee is allowed to the ſheriff for his trouble which he had in the execution; and if there be a ſecond execution, (as where the party dies in execution, and a *fi. fa.*) he ought to have a fee for that alſo. Ruled *per Holt* ch. j. An action will lie for his fee; for the law

Fees due on a ca. ſa.

and on a ſecond execution.

law permitting him to take it, makes it a duty. *Show.* 363. *Salk.* 331.

Fee on elegit. The ſheriff ſhall have the fees for executing an *elegit*. *Salk.* 333.

His poundage when the ſum exceeds 100 l. Where the ſum exceeds 100 *l.* the ſheriff ſhall have 12 *d.* for every pound of the firſt hundred, and 6 *d.* for every other pound over the 100 *l.* *Cro. Car.* 286, 287.

Extends not to cities or towns. The proviſo that this ſhall not extend to cities or towns corporate, is only to be intended for the executing of judgments in the courts of ſuch corporations, and not to the ſheriffs of cities or corporations, for the executing judgments out of ſuperior courts. *Cro. Car.* 287.

Nor to real executions. This ſtatute doth not extend to real executions but only to executions in perſonal actions; therefore does not extend to an *habere facias ſeiſinam* or *poſſeſſionem*. Salk. 331. Sed vide antea ſtat. 3 Geo. 1.

Nor to executions on ſtat. merchant, &c. The ſtatute does not extend to executions upon ſtatute merchants, recognizances, *&c.* for the act is to be underſtood where the judgment *redditur in invitum*, and not by the voluntary confeſſion of the party. *Salk.* 331, 332.

Sheriff may not take a bond for his fees. Though the ſheriff may have ſuch fees as are allowed by the ſtatute, he may not take a bond for them; for under the colour thereof he may ſo have double fees. *Cro. Car.* 287.

Sheriff to ſubſcribe the attorney's name on every warrant. Every ſheriff or other officer, who ſhall make out any warrant upon any writ, and not ſubſcribe the name of the attorney who ſued out the ſame, ſhall forfeit 5 *l.* to be aſſeſſed as a fine by the court; one moiety to the

the king, the other to the party grieved. *Stat.* 12 *Geo.* 2. *c.* 13. §. 4.

Sheriff to return writs and bring in the body six days after service of rule, or else attachment.

The court taking into consideration the great delays and expences that attended the old method of amercing sheriffs for not returning writs, and bringing into court the body of defendants arrested by them, ordered, that for the future all writs should be returned, and the body of every such defendant should be brought into court within six days next after service of a rule on the under sheriff for that purpose; and on default thereof the court will grant an attachment against the sheriff, without giving him a day to shew cause. *Trin.* 5, 6 *Geo.* 2.

Judicial writs to be executed by sheriffs in Wales.

By a rule made *Hil.* 19 *Jac.* 1. taking notice, that it was a query whether judicial writs issuing out of this court could be executed in the counties of *Wales*, and that divers precedents had been considered by the court, whereby it appeared to be the constant usage of the court to issue such writs into those counties; it is declared, that all such judicial writs may be awarded to, and ought to be executed by the sheriffs of those counties in such manner as judicial writs by the sheriffs in *England*. *Raym.* 206. 1 *Lev.* 291. 2 *Keb.* 649, 657, 724. 2 *Saund.* 193.

Sheriff of Chester *to return writs directed to him.* 2 Str. 1089.

And by a rule made *Trin.* 21 *Car.* 1. it is ordered, that the sheriff of the county of *Chester* shall return all writs issuing out of this court directed to him, according to the return of such writs, on pain of forfeiting 50 *l.* *Raym.* 171. 1 *Lev.* 256. 1 *Sid.* 407. 2 *Keb.* 410, 464.

The

Deputy ſheriffs and other officers to attend the court.

The deputy ſheriffs, and all other officers of the court, ought perſonally to appear before the eſſoin-day of every ſecond return of every term, and continue there during the reſidue of the term. *Mich.* 1654.

Sheriff on requeſt and coſt of a lord of a franchiſe or liberty, to appoint a deputy to reſide at ſome place in or near the franchiſe.

Place and coſts to be appointed and ſettled by lord chancellor, &c.

The ſheriff of every ſhire, being no city or town made a ſhire, within which there is any franchiſe or liberty, the lord whereof is intitled to the return of writs, ſhall (if required by ſuch lord) within one month after ſuch requeſt, nominate and appoint one or more deputy or deputies at the coſts of ſuch lord, to be reſident at ſome convenient town or place in or near ſuch franchiſe or liberty, to be appointed by the lord chancellor and chief juſtice of *B. R.* and *C. B.* or one of them, hereby authoriſed to appoint ſuch town or place, and to ſettle what coſts or charges ſhall be paid therefore by ſuch lord; and ſuch deputy or deputies ſhall reſide at ſuch town or place ſo to be appointed, and have authority in the ſheriff's name to receive and open all ſuch writs and proceſs, (the execution or return whereof doth belong to the lord of ſuch franchiſe or liberty) and in the name and under the ſeal of the ſheriff to iſſue out ſuch warrant or warrants to ſuch lord, as by law is requiſite, for the due execution of ſuch writ or proceſs; and ſuch deputy or deputies is, and are required, on tender of any ſuch writ or proceſs, to receive and open the ſame, and iſſue ſuch warrant therein without delay, in ſuch mnnner and form as the ſheriff may or ought to do, without taking any further fee than what is now due and accuſtomed for ſuch warrant; on pain that every ſuch ſheriff

Deputy to receive writs, and in name and under ſeal of ſheriff to iſſue warrants to the lord of the franchiſe.

Taking no more than the accuſtomed fees.

or

or deputy, guilty of any wilful neglect or default, ſhall be puniſhed as for a contempt of court, and make ſatisfaction to the party damaged. *Stat.* 13 *Geo.* 2. *c.* 18. §. 6.

Puniſhment of ſheriff or deputy making wilful neglect.

All ſheriffs ſhall, at the expiration of their office, turn over to the ſucceeding ſheriff, by indendure and ſchedule, all ſuch writs and proceſs as ſhall remain in their hands unexecuted, who ſhall duly execute and return the ſame; and in caſe any ſuch ſheriff ſhall refuſe or neglect to turn over ſuch proceſs, in manner aforeſaid, every ſuch ſheriff ſo neglecting or refuſing, ſhall be liable to make ſuch ſatisfaction, by damages and coſts, to the party aggrieved, as he, ſhe or they ſhall ſuſtain by ſuch neglect or refuſal. *Stat.* 20 *Geo.* 2. *c.* 37. §. 1.

Sheriff to turn over all proceſs to ſucceeding ſheriff.

Penalty.

No ſheriff ſhall he liable to be called upon to make return of any writ or proceſs, unleſs he be required ſo to do within ſix months after the expiration of his ſaid office. *Same ſtat.* §. 2.

Not to be called upon to return any writ, unleſs required within ſix months after expiration of his office.

Queen *Elizabeth* by letters patent granted the office of clerk of the county court or, ſhire clerk of the county of *Somerſet*, to *Mitton*, with all fees, *&c.* for term of his life, and afterwards appointed *Arthur Hopton*, Eſq; ſheriff of the ſame county, who interrupted *Mitton*, claiming that which was mentioned to be granted to *Mitton* to be incident to his office of ſheriff, and thereupon he appointed a clerk himſelf of the county court. Reſolved that the letters patent were void in law. *Paſch.* 26 *Eliz. Mitton*'s caſe, 4 *Co.* 32. *b.*

The office of county clerk is in the diſpoſition of the ſheriff, and not of the king.

As

Commiſſioners for taking affidavits.

As to commiſſioners for taking affidavits.

Commiſſioners for taking affidavits concerning matters in this court to be appointed by the judges.

The judges of this court, or any two of them, whereof the chief juſtice to be one, ſhall and may by one or more commiſſion or commiſſions under the ſeal of this court from time to time, as need ſhall require, impower what and as many perſons as they ſhall think fit and neceſſary in all and every the ſeveral ſhires and counties within the kingdom of *England*, dominion of *Wales* and town of *Berwick upon Tweed*, to take and receive all and every ſuch affidavit and affidavits, as any perſon or perſons ſhall be willing and deſirous to make before any of the perſons ſo impowered in or concerning any cauſe, matter or thing depending, or any wiſe concerning any of the proceedings in the ſaid court, as maſters of *Chancery* in extraordinary do uſe to do; and any judge of aſſiſe in his circuit may take and receive any affidavit or affidavits, as any perſon or perſons ſhall be willing and deſirous to make before him in or concerning any cauſe, matter or thing depending or in any wiſe concerning any proceedings in the ſaid court; which ſaid affidavits taken as aforeſaid ſhall be filed, and then be read and made uſe of in the ſaid court to all intents and purpoſes as other affidavits taken in the ſaid court now are; and all and every affidavit and affidavits taken as aforeſaid ſhall be of the ſame force as affidavits taken in the ſaid court now are; and all and every perſon and perſons forſwearing him, her or themſelves in ſuch affidavit or affidavits, ſhall incur and be liable unto the

Any judge of aſſiſe in his circuit may take ſuch affidavit.

Affidavits to be filed, and then read and uſed, &c.

Penalty of perjury in ſuch affidavits.

the ſame penalties as if ſuch affidavit or affidavits had been made and taken in open court. *Stat.* 29 *Car.* 2. *c.* 5. §. 2.

For the taking of every ſuch affidavit, the perſon or perſons ſo impowered and taking the ſame, ſhall for ſo doing receive only the ſum or fee of 12 *d.* and no more. *Same ſtat.* §. 3. *Fee for taking ſuch affidavit.*

As to commiſſioners for taking bails.

The juſtices of this court, or any two of them, whereof the chief juſtice to be one, may by one or more commiſſion or commiſſions under the ſeal of this court from time to time, as need ſhall require, impower ſuch and ſo many perſons other than common attornies and ſolicitors, as they ſhall think fit and neceſſary in all and every the ſeveral ſhires and counties within the kingdom of *England*, dominion of *Wales* and town of *Berwick upon Tweed*, to take and receive all and every ſuch recognizance or recognizances of bail or bails, as any perſon or perſons ſhall be willing or deſirous to acknowledge or make before any of the perſons ſo impowered, on any action or ſuit depending in this court, in ſuch manner and form, and by ſuch recognizance or bail-piece as the juſtices of this court have uſed to take the ſame; which ſaid recognizance or recognizances of bail or bail-piece ſo taken as aforeſaid, ſhall be tranſmitted to ſome or one of the juſtices of this court, who, upon affidavit made of the due taking of the recognizances of ſuch bail or bail-piece, by ſome credible perſon preſent at the taking hereof, ſhall receive the ſame upon payment of ſuch fees as have been uſually *Commiſſioners for taking bails in this court to be appointed by the judges.* *Recognizance to be tranſmitted to a judge of the court.* *Affidavit of the due taking,* &c.

uſually received for the taking of ſpecial bails by the juſtices clerks, and other the officers of this court; which recognizance of bail or bail-piece ſo taken and tranſmitted ſhall be of the like effect as if the ſame were taken *de bene eſſe* before any of the ſaid juſtices; for the taking of every which recognizance or recognizances of bail or bail-piece, the perſon or perſons ſo impowered ſhall receive only the ſum or fee of 2 *s.* and no more. *Stat.* 4 *W. & M. c.* 4. §. 1.

Fee for taking, &c.

Judges to make rules for juſtifying, &c.

The juſtices in this court ſhall make ſuch rules and orders for the juſtifying of ſuch bails, and making the ſame abſolute, as to them ſhall ſeem meet, ſo as the cognizor or cognizors of ſuch bail or bails be not compelled to appear in perſon in this court to juſtify him or themſelves; but the ſame may and is hereby directed to be determined by affidavit or affidavits taken before the ſaid commiſſioners, who are hereby impowered and required to take the ſame, and alſo to examine the ſureties upon oath touching the value of their reſpective eſtates, unleſs the cognizor or cognizors of ſuch bail do live within the cities of *London* and *Weſtminſter*, or within ten miles thereof. *Same ſtat.* §. 2.

The ſame to be by affidavit,

unleſs, &c.

Any judge of aſſiſe in his circuit may take ſuch bail.

Any judge of aſſiſe in his circuit may take and receive all and every ſuch recognizance and recognizances of bail or bails, as any perſon ſhall be willing and deſirous to make and acknowledge before him, which being tranſmitted in like manner as aforeſaid, ſhall (without oath) be received in manner as aforeſaid upon payment of the uſual fees. *Same ſtat.* §. 3.

Every

Every perſon which ſhall acknowledge or procure to be acknowledged any fine, *&c.* recognizance or recognizances, bail or bails, *&c.* in the name of any other perſon not privy or conſenting to the ſame, and being thereof convicted, ſhall be adjudged to be a felon and ſuffer death, *&c.* without benefit of clergy. *Stat.* 21 *Jac.* 1. *c.* 26. 1 *Hale's H. P. C.* 696; *et vide ſtat.* 4 *W. & M. c.* 4. §. 4. whereby perſonating another before thoſe who have authority by that act to take bail, ſo as to make him liable to the payment of any ſum of money in that ſuit or action, is made felony. *Acknowledging bail in the name of any other not privy or conſenting, felony.*

Two people put in bail in feigned names, and there being no ſuch perſons could not be proſecuted for perſonating bail, on *ſtat.* 21 *Jac. c.* 26. ſo they and the attorney were ſet in the pillory. *Stra.* 384.

Officers on the circuit.

Note; the ſeveral counties in *England*, except *Middleſex* and *Cheſhire*, are divided into ſix circuits, *viz.* *Circuits.*

The *Midland circuit* containing the counties of

Northamptom,	*Derby*,
Rutland,	*Leiceſter*,
Lincoln,	*Warwick*.
Nottingham,	

The *Norfolk circuit.*

Bucks,	*Cambridgeſhire.*
Bedford,	*Norfolk,*
Huntingdonſhire,	*Suffolk.*

The *Home circuit.*

Hertford,	*Suſſex,*
Eſſex,	*Surrey.*
Kent,	

The *Oxford circuit.*

Berks,	*Hereford,*
Oxford,	*Salop,*
Glouceſter,	*Stafford,*
Monmouth,	*Worceſter.*

The *Weſtern circuit.*

Southamptonſhire,	*Cornwall,*
Wilts,	*Devonſhire,*
Dorſet,	*Somerſet.*

The *Northern circuit.*

Yorkſhire,	*Cumberland,*
Durham,	*Weſtmoreland,*
Northumberland,	*Lancaſhire.*

Clerk of aſſiſe.

The office of clerk of aſſiſe is a very antient office, commencing doubtleſs at the ſame time the judges firſt went the circuits:

Antiquity of the office.

Habeant de cætero omnes juſticiarii de bancis in itineribus clericos irrotulantes omnia placita coram eis placitata, ſicut antiquitus habere conſueverunt. Stat. Weſtm. 2. 13 Ed. 1. c. 30. Vide 2 Inſt. 425. Dyer 175. 4 Co. 32. b.

This office has always been granted for life.

By the *ſtat.* 33 *H.* 8. *c.* 24. the clerk of aſſiſe is diſabled from acting as counſel within

in the circuit, whereof he is clerk of aſſiſe, during the time of the ſeſſion of aſſize or *Niſi prius*.

The clerk of the aſſiſe has the care and cuſtody of, and is anſwerable for, all the records which properly belong to his office. When the circuits are appointed, he is to attend the judges, and receive their directions about the times and places of holding the aſſiſes in the reſpective counties within his circuit; to ſue forth the ſeveral commiſſions and writs of aſſociation for holding the ſame: To iſſue out precepts thereupon; one upon the commiſſion of aſſiſe, and another upon the commiſſion of oyer and terminer for every county in his circuit, directed to the reſpective ſheriffs, in order for them to ſummon and return the ſeveral juries; which precepts are firſt ſigned and ſealed by the judges, and then delivered to the ſeveral ſheriffs, to be by them executed for the purpoſe aforeſaid. He is to travel and attend upon this occaſion with all his under officers, and carry along with him the commiſſions, and ſuch of the publick books and records belonging to his circuit, as the current buſineſs of the circuit may require. He is to receive and file the returns of all writs and precepts, all inquiſitions in murder and manſlaugher, all appeals and all recognizances, informations, and examinations taken before and returned by the juſtices of the peace of the ſeveral counties within his circuit, to enter and docket all the cauſes on the crown-ſide. When the priſoners are called to the bar to take their trials, it is the duty of the clerk of *His duty.*

aſſiſe to make an abſtract of the bill againſt every priſoner with the witneſſes names, for the uſe and better information of the judge before he proceeds to the trial, and alſo to enter upon a roll the panel of the jurors who try the priſoner, and the name of the priſoner tried by the jurors, and the judgments given by the court, are, or ought to be, always entered by the clerk of the aſſiſe upon record as ſoon as conveniently may be after the aſſiſes are ended. It is alſo his duty to make the calendars, and deliver copies thereof to the judges of aſſiſe, in which all the judgments and orders of the court are entered, which calendars are ſigned by the judges, and afterwards delivered to the reſpective ſheriffs as their warrants and authority for putting the ſaid judgments and orders in execution. Upon indictments and preſentments for treſpaſſes, miſdemeanors, and other offences where the parties are not in cuſtody, or upon bail, it is his duty to iſſue out proceſs againſt the ſeveral defendants, in order to compel an appearance, and make them anſwer the charge alledged againſt them reſpectively in all ſuch indictments and preſentments, that the king, in caſe the party be preſented, may have his fine. At the cloſe of every aſſiſes he is to call over all perſons bound by recognizance, and to mark the ſeveral diſcharges and reſpits thereon; and after the aſſiſes are over, it is his buſineſs to draw up an *eſcheat* of the recognizances, fines, amerciaments and iſſues forfeited or impoſed in his circuit at that aſſiſe; and after the judges have been attended with, and have ſigned the

ſame,

ſame, it is to be ingroſſed on a parchment roll, and returned into the *Exchequer* upon oath.

The clerks of aſſiſe, their deputies or aſſiſtants, are perſonally to appear with their *poſteas* on the firſt day of *Eaſter* and *Michaelmas* terms. *Mich.* 1654.

The aſſociate on the circuit is an officer holding under the appointment of the clerk of aſſiſe. *Aſſociate on the circuit.*

It is his duty to attend on the *Niſi prius* ſide of the court, to receive from the marſhal all the records, to mark upon the panel in every cauſe that is tried the jurors who appear and are ſworn, to read all exhibits, and to take and record verdicts, to draw up and enter the orders, and to return the *poſteas.* *His duty.*

The clerk of the arraigns likewiſe holds his place by the appointment of the clerk of aſſiſe. *Clerk of the arraigns.*

It is the duty of the clerk of the arraigns to attend on the crown-ſide of the court, to read the commiſſions, to call over the juſtices and all other officers and miniſters who are obliged to attend the court, to receive the conſtables preſentments, to call over the grand jury and petty jury, to arraign the priſoners, *&c.* *His duty.*

The clerk of the indictments is an officer alſo appointed by the clerk of aſſiſe. *Clerk of the indictments.*

It is his duty to attend every circuit at the place where the clerk of the aſſiſe uſually

keeps his office, and to draw and ingroſs all bills of indictment which are to be preferred and laid before the grand jury, in each reſpective county upon the circuit.

Judge's marſhal. The judge's marſhal on the circuit holds his office by parol appointment of the judge during pleaſure.

Duty. The marſhal is to attend in court, and at the judge's lodgings, during the time of the aſſiſes, to receive the records and writs of *Niſi prius* between party and party, and to marſhal and enter the ſame, together with the traverſes on the crown-ſide, between the king and the party, in a book kept for that purpoſe; and from ſuch book to make out a paper or ſchedule of the ſaid cauſes, for the peruſal and inſpection of the judges, the counſel and attornies. He alſo opens the records, and has the cuſtody of them till the iſſues joined are reſpectively tried. He alſo enters *ne recipiatur*, which entry is a notice to the parties that ſuch cauſe is not to be entered or tried at that aſſiſe; and when cauſes are not tried, it is his buſineſs to take care of the records till called for by the parties. It is alſo his buſineſs, ſince the late act of parliament for regulating juries, to receive from the ſheriffs, at the beginning of the aſſiſe in every county, the names of the jury between party and party, and to roll them up and put them into the box as directed by the ſaid act, and to take the care and cuſtody of the ſaid box when the names are put in, and to take care of the ballots, purſuant to the directions of the ſaid act.

The

The judge's cryer on the circuit holds his office, during pleaſure, by parol appointment of the judge. *Judge's cryer.*

It is his duty to make the ſeveral proclamations, to call over all the juſtices of the peace, mayors, bailiffs of corporations and boroughs, coroners, conſtables, to be ſworn to their preſentments, bailiffs, and other officers; to call the grand jury; to call and ſwear the petty juries; to ſwear the bailiffs, to prove ſervice on ſuch jurymen as are called and do not appear between party and party; to ſwear witneſſes, and all other perſons who are to be examined in court; to adjourn and open the court. *His duty.*

Judge's clerk and ſteward on the circuit. Theſe offices are uſually executed by one and the ſame perſon, who is verbally appointed thereto by the judge, to hold during pleaſure. *Judge's clerk and ſteward.*

It is his duty to draw up and ingroſs on parchment the admiſſion of infants to ſue by their next friend, or defend by guardian; to read over to the parties the contents of all fines and warrants of attorney for ſuffering common recoveries taken or acknowledged before the judge of aſſiſe, and to write the captions thereon, and to keep duplicates thereof ſigned by the party acknowledging the ſame, and to file them in due order as they are taken. He uſually attends the judge as train-bearer, not only to and from the court, but on all other occaſions that require the judge to go in his robes. It is his duty *His duty.*

to pay all bills, and keep and make up the account of the circuit.

The judges ſervants claim fees on the circuit: Their duty I am a ſtranger to; but as officer and fees are relative terms, I have put them under the head of officers on the circuit.

Sheriff's duty on the circuit. The ſheriff of each county is to wait upon the judges from their lodgings to the court and back again; to return writs of *venire*, *habeas corpora*, *diſtringas's*, and other proceſs; to return tales-men; to receive the calendar from the clerk of aſſiſe, and to ſee that the ſeveral judgments pronounced by the court in capital caſes be duly put in execution.

Coroners. The coroners of each county are to attend the aſſiſes, and to deliver to the clerk of the aſſiſe all inquiſitions of murder and manſlaughter, and all inquiſitions of *felons de ſe*, *per infortunium interfect. ex viſitatione dei*, and all inquiſitions whereby any deodands are found, in order that the clerk of aſſiſe may tranſmit them to the coroner and attorney of his majeſty's court of *King's Bench*, to the end that proceſs may iſſue for bringing in the deodand. He is likewiſe to attend to return the *venire*, *habeas corpora*, *diſtringas*, and other proceſs in the ſuit, where the ſheriff is related to either party, or intereſted in the ſuit.

Attornies of the court.

BEFORE the *ſtat. Weſtm.* 2. 13 *Ed.* 1. *c.* 10. all attornies were made by letters patent under the great ſeal, commanding the juſtices to admit ſuch particular perſons to be attornies for the parties reſpectively.

Attornies to be admitted in ſome of the inns of court, &c.

Attornies ſhould procure themſelves to be admitted into ſome of the inns of court, or *Chancery*, and take chambers there (if they may be had) or lodgings near the ſaid inns, and leave notice in writing with the butler or porter of the inn whereof they are admitted, where their lodgings are (except ſuch perſons as are inhabitants or houſe-keepers in *London*, *Weſtminſter*, *Southwark*, or the ſuburbs thereof, and liberty of the tower of *London*, and St. *Katharine*'s there) and ſuch who are ſworn attornies of any courts, within the ſaid cities, towns and liberties. *Mich.* 1654. *Mich.* 3 *Annæ.*

Exception.

No one to act as attorney unleſs admitted, &c.

No perſon can practice as an attorney of this court, in his own or another's name, unleſs he be ſworn, admitted and inrolled, purſuant to the direction of the *ſtat.* 2 *Geo.* 2. *c.* 23. continued by *ſtat.* 22 *Geo.* 2. *c.* 46. together with the alterations and amendments made by *ſtat.* 12 *Geo.* 2. *c.* 13. until the 24th of *June* 1757. and from thence to the end of the next ſeſſion of parliament. And made perpetual by *ſtat.* 30 *Geo.* 2. *c.* 19. §. 75.

None to be admitted unleſs ſerved a clerkſhip of 5 years.

No perſon ſhall act as attorney, unleſs he ſhall have been bound by contract in writing to ſerve as a clerk for five years to an attorney,

ney, duly admitted as by the act is directed, and ſhall have continued for five years in ſuch ſervice; and ſhall be examined, ſworn, admitted and inrolled, as by the ſaid act is directed. §. 5.

If his maſter dies in the 5 years, may ſerve the remainder of his time with another.

If the attorney, to whom ſuch perſon ſhall be bound, ſhall happen to die before the expiration of the five years, or ſuch contract ſhall by mutual conſent be vacated, or ſuch clerk be diſcharged by rule of court before the expiration of the five years, then ſuch perſon ſhall by contract in writing ſerve as clerk to ſome other attorney during the reſidue of the ſaid five years. *Stat.* 2 *Geo.* 2. *c.* 23. §. 9, 12. tho' without entring into any new articles. *Stat.* 22 *Geo.* 2. *c.* 46. §. 15.

An attorney before he is admitted is to take the following oath. *Same ſtat.* §. 3.

Attorney's oath.

I A. B. *do ſwear, that I will truly and honeſtly demean myſelf in the practice of an attorney, according to the beſt of my knowledge and ability.* So help me GOD.

Quaker may be admitted an attorney.

A quaker having ſerved a clerkſhip with an attorney, and qualified as by the *ſtat.* 2. *Geo.* 2. *c.* 23. is directed, and taking his ſolemn affirmation inſtead of the oath thereby directed, may be admitted and inrolled as an attorney. *Stat.* 12 *Geo.* 2. *c.* 13. §. 8.

Articles between an attorney of K. B. and turnkey of K. B. priſon cancelled by rule of court;

F. An attorney of the court of *K. B.* had taken for his articled clerk one *S.* a turnkey of the *K. B.* priſon; a full aged man, who ſtill continued to act as turnkey. It did not appear that any money was paid, or that the maſter fed, lodged, or entertained the clerk, (though

(though the articles indeed covenanted that he ſhould), nor did the clerk officiate for *F.* but in matters relating to the priſon. It appeared that *F.* had, ſince theſe articles, (which were dated only two years ago) become concerned in ſixty-three cauſes, on behalf of the priſoners in the gaol. This whole matter being diſcloſed to the court of *K. B.* upon application of the clerk of the papers of the priſon; the whole court were all very clear that theſe articles were merely colluſive, that the whole was a contrivance between *F.* and the turnkey, to ſecure the buſineſs ariſing from the priſoners; that the exerciſe of the office of a turnkey in a priſon was, both in itſelf, and alſo according to the intent and ſpirit of the act (2 *Geo.* 2. *c.* 23.) for regulating attornies, a very improper education for the profeſſion of an attorney, and therefore theſe articles were, by the expreſs order of the court of *K. B.* cancelled in court by the ſecondary of the court, and directed to be kept in court, and not delivered back. *Bur.* 291.

A turnkey of a priſon not being properly qualified for the law.

An attorney duly admitted in this court, may, with the conſent of any attorney of any other court of law, (ſuch conſent being in writing, and ſigned by ſuch attorney) and in the name of ſuch attorney, proſecute and defend any action or proceeding in ſuch court. *Stat.* 2 *Geo.* 2. *c.* 23. §. 10.

Attorney, with conſent of attorney of another court, may practice in ſuch court.

No attorney ſhall have more than two clerks at the ſame time, bound by contract in writing to ſerve him as clerk. *Same ſtat.*

No attorney to have more than 2 clerks at one time.

Chief clerk without fee to inrol the names of the attornies admitted, in alphabetical order,

Attornies to be inrolled.

der, whereto all perſons may have acceſs without fee or reward. *Same ſtat.* §. 15.

Attorney, permitting one that is not an attorney to practice in his name, diſabled to practice.

An attorney knowingly and willingly permitting any perſon to practice in his name, not being a ſworn attorney, and being thereof lawfully convicted, ſhall from thenceforth be diſabled from practiſing as an attorney. *Same ſtat.* §. 17.

Attorney, who gives another leave to practice in his name, is anſwerable for what is ſo done.

Lord ch. j. *Holt*, ſaid, That if one attorney gives leave to another to practice in his name, he ſhall anſwer for all the villanies and practices as he ſhall act in his name. 12 *Mod.* 666.

Attachment againſt attorney for putting name of an attorney to proceedings without his leave.

The court of *K. B.* granted an attachment againſt one *Arabin*, who acted as attorney for the plaintiff, and had put the name of an attorney of that court to the proceedings, without authority or leave from him. *Bur.* 20.

Penalty on perſons practiſing, not being admitted.

Any perſon in his own name, or the name of any other, practiſing as attorney, in expectation of any fee, gain or reward, without being admittedand inrolled an attorney, ſhall forfeit 50*l.* to the uſe of any who ſhall proſecute for the ſame within 12 months after the offence committed, together with treble coſts, and be made incapable to maintain any ſuit for any fees, reward or diſburſements on account of the buſineſs ſo done by him as an attorney. *Same ſtat.*

Every perſon bound clerk to cauſe an affidavit to be made of the execution of

Every perſon, who ſhall be bound by contract in writing to ſerve as clerk to any attorney, as by the *ſtat.* 2 *Geo.* 2. *c.* 23. is directed, ſhall, within three months next after the date of every ſuch contract, cauſe an affidavit to be

be made, and duly ſworn, of the actual execution of ſuch contract by every ſuch attorney, and the perſon ſo to be bound as a clerk; and in every ſuch affidavit ſhall be ſpecified the name of the attorney and of the perſon ſo bound, and their places of abode reſpectively, together with the day of the date of ſuch contract; and every ſuch affidavit ſhall be filed within the time aforeſaid in the court where the attorney hath been inrolled as an attorney, with the officer after mentioned, who ſhall mark the day of the filing the affidavits on the back, or at the botton thereof. *Stat.* 22 *Geo.* 2. *c.* 46. §. 3.

the articles, ſpecifying the names and places of abode of the parties, date, &c.

Affidavit to be filed, and the day of the filing marked thereon.

No perſon ſhall be admitted an attorney before ſuch affidavit ſhall be produced and openly read in court. *Same ſtat.* §. 4.

No perſon to be admitted an attorney till the affidavit be read in court.

The chief clerk, or his deputy, ſhall be deemed the proper officer for filing ſuch affidavits in this court; *ſame ſtat.* §. 5. and ſhall keep a book, wherein ſhall be entered the ſubſtance of every ſuch affidavit, ſpecifying the names and places of abode of every ſuch attorney and clerk, and of the perſon making ſuch affidavit, with the date of the articles, and the days of ſwearing and filing ſuch affidavit; and may take at the time of filing ſuch affidavit, 2 *s.* 6 *d.* for his trouble in filing ſuch affidavit and keeping ſuch affidavit, and keeping ſuch book, which book may be ſearched in office hours by any perſon without fee. *Same ſtat.* §. 5, 6.

Chief clerk to file ſuch affidavit, and enter in a book the ſubſtance thereof.

Fee for the ſame, 2 s. 6 d.

Book to be ſearched gratis.

No attorney ſhall have, take or retain any clerk who ſhall be bound by contract in writing

No attorney to take ſuch clerk

after he has diſcontinued buſineſs.

ting as aforeſaid, after ſuch attorney ſhall have diſcontinued or left off, or during ſuch time as he ſhall not actually practice as, or carry on the buſineſs of an attorney. *Same ſtat.* §. 7.

Every perſon ſo bound, to be during the whole time actually employed by ſuch attorney.

Every perſon who ſhall become bound by contract in writing to ſerve any attorney, as by the ſaid act is directed, ſhall, during the whole time of ſervice ſpecified in ſuch contract, continue and be actually employed by ſuch attorney or his agent in the proper buſineſs, practice or employment of an attorney. *Same ſtat.* §. 8.

If before the expiration of the time the attorney die, &c. or the clerk be diſcharged by order,

and the clerk be bound to another attorney for the remainder of the time,

ſuch ſervice to be good.

Provided if any ſuch attorney, to whom ſuch perſon ſhall be ſo bound, ſhall happen to die before the expiration of ſuch term, or diſcontinue or leave off his practice as aforeſaid, or if ſuch contract ſhall by mutual conſent be cancelled, or in caſe ſuch clerk ſhall be legally diſcharged by any rule or order of the court before the expiration of ſuch term, and ſuch clerk ſhall in any of the ſaid caſes be bound by another contract or contracts in writing to ſerve, and ſhall accordingly ſerve in manner before mentioned as clerk to any other ſuch practiſing attorney or attornies, during the reſidue of the ſaid term of five years, then ſuch ſervice ſhall be deemed as effectual as if he had continued to ſerve as a clerk for the ſaid term to the ſame perſon to whom he was originally bound; ſo as an affidavit be duly made and filed of the execution of ſuch ſecond contract or contracts within the time, and in like manner as is before directed concerning ſuch original contract. *Same ſtat.* §. 9.

So as affidavit be made, &c. of the execution of the ſecond articles.

Every

Every perſon, who ſhall become bound as a clerk as aforeſaid, ſhall, before he be admitted an attorney according to the ſaid act, cauſe an affidavit of himſelf, or ſuch attorney, to whom he was bound as aforeſaid, to be duly made and filed with the officer for that purpoſe appointed, that he hath actually and really ſerved, and been employed by ſuch practiſing attorney or attornies, to whom he was bound as aforeſaid, or his or their agent or agents, during the ſaid whole term of five years, according to the true intent and meaning of this act. *Same ſtat.* §. 10.

Before admittance of an attorney, affidavit to be made and filed of actual ſervice.

If any ſworn attorney ſhall act as agent for any perſon or perſons, not duly qualified to act as an attorney as aforeſaid, or permit or ſuffer his name to be any ways made uſe of upon the account or for the profit of any unqualified perſon or perſons, or ſend any proceſs to any unqualified perſon or perſons, thereby to enable him or them to appear, act or practice in any reſpect as an attorney, knowing him not to be duly qualified as aforeſaid; and complaint ſhall be made thereof in a ſummary way to the court from whence any ſuch proceſs did iſſue, and proof made thereof upon oath to the ſatisfaction of the court, that ſuch ſworn attorney hath offended therein as aforeſaid; then and in every ſuch caſe, every ſuch attorney ſo offending ſhall be ſtruck off the roll, and for ever diſabled from practiſing as an attorney; and in that caſe, and upon ſuch complaint and proof made as aforeſaid, the court may commit ſuch unqualified perſon to the priſon of the court

Attorney acting as agent, or permitting his name to be uſed for, or ſending any proceſs to any unqualified perſon, thereby to enable him to appear or act as an attorney, to be ſtruck off the roll.

And the unqualified perſon to be committed.

court for any time not exceeding one year. *Same ſtat.* §. 11.

None but attornies to practice at the general or quarter ſeſſions,

Every perſon who ſhall act as a ſolicitor, attorney or agent, or ſue out any proceſs at any general or quarter ſeſſions of the peace, either with reſpect to matters of a criminal or civil nature, unleſs admitted an attorney of one of the courts of record at *Weſtminſter*,

under the penalty of 50 l.

ſhall be ſubject to a penalty of 50 *l.* to be recovered by action of debt, *&c.* to be commenced within twelve months, with treble coſts;

No attorney to permit an unqualified perſon to uſe his name at the ſeſſions, under the like forfeit.

and if any attorney ſhall permit any perſon, not being admitted as aforeſaid, to make uſe of his name in the courts of general or quarter ſeſſions, ſuch attorney ſhall be ſubject to a like penalty of 50 *l.* to be recovered in manner as aforeſaid. *Same ſtat.* §. 12.

Provided that nothing herein ſhall extend to deprive attornies of the duchy of *Lancaſter*, courts of the great ſeſſions in *Wales*, or of the counties palatine, from acting within their reſpective juriſdictions. *Same ſtat.* §. 13.

No clerk of the peace, &c. to act as ſolicitor, attorney or agent at the ſeſſions,

No clerk of the peace, or his deputy, nor any under ſheriff, or his deputy, ſhall act as a ſolicitor, attorney or agent, or ſue out any proceſs at any general or quarter ſeſſions of the peace where he ſhall execute the office of clerk of the peace, or deputy clerk of the peace, under ſheriff or deputy, on any pretence whatſoever;

under the penalty of 50 l.

but if any ſuch ſhall act as ſolicitor, attorney or agent, as aforeſaid, he ſhall be ſubject to a like penalty of 50 *l.* to be recovered in manner aforeſaid. *Same ſtat.* §. 14.

Penalty on perſons unqualified

By *ſtat.* 12 *Geo.* 2. *c.* 13. §. 7. "In caſe any perſon ſhall commence or defend any action,

action, or sue out any writ, process or summons, or carry on any proceedings in the county court, in any county in *England*, who is not admitted an attorney or solicitor, such person shall forfeit 20 *l.* to be recovered with costs by any person who shall sue within twelve months after such offence committed, in any court of record."

acting in county courts.

Motion for an attachment against a man for practising as an attorney in the county court, not being regularly admitted according to the statute 2 *Geo.* 2. *c.* 23. the court said if this man had practised in their court, it would have been a contempt in him, and they should have granted an attachment; but as he has practised in another court, it is only a contempt in him to that court; for which reason they refused the motion, and left him to be prosecuted for the penalty, as the law directs. 2 *Barnard. K. B.* 277.

When a person practises as an attorney in the county court without being qualified according to the stat. of 2 Geo. 2. c. 23. *the superior courts will not grant an attachment against him, but leave the party to his remedy provided by the statute.*

By stat. 2 *Geo.* 2. *c.* 23. §. 22. "Every process for arresting, and every writ of execution, or some label annexed, and every warrant upon such process, shall before service or execution be subscribed or indorsed with the name of the attorney, clerk in court, or solicitor, by whom such process, *&c.* shall be sued forth; and where such attorney, *&c.* shall not be the person immediately employed, then also with the name of the attorney so immediately employed; and every copy of any writ served upon any defendant shall before service be subscribed with the

Name of attorney to be written on every writ.

name of the attorney immediately employed."

How far a writ ſhall not be ſaid to be duly marked with the name of the plaintiff's attorney, according to the intent of the above ſtat. 2 Barnard. K. B. 79.

Motion that the defendant's bail might be diſcharged, and the proceſs on which he was taken ſet aſide, for not being marked with the name of the attorney, as the above act requires; it was agreed that it was marked with the name of the perſon, whom the attorney employed to manage this cauſe for him; but judge *Lee* ſaid, that this perſon could at moſt be conſidered only as a ſolicitor in the cauſe, and the act requires, that the writ ſhould be marked with the name of the attorney and ſolicitor; accordingly the court made a rule to ſhew cauſe. 2 *Barnard. K. B.* 79.

On ſhewing cauſe the fact was, that the plaintiff had employed one *Cunningham* as his attorney, to ſue the defendant in the *Common Pleas*, which *Cunningham* accordingly did; but afterwards adviſed the plaintiff to diſcontinue that action, and bring one in the court of *King's Bench*, to prevent the defendant's being able to keep the plaintiff out of his money by writs of error, longer than he could do if the action was in the *King's Bench*; at the ſame time Mr. *Cunningham* told the plaintiff, that he was only attorney in the *Common Pleas*, and therefore the plaintiff muſt employ ſome attorney in this court; accordingly the plaintiff deſired Mr. *Cunningham* to employ whom he would for him, which Mr. *Cunningham* did, and afterwards wrote the plaintiff word that he had employed Mr. *Stone* for him. Upon this ſtate of the caſe Mr. *Fazakerly* ſaid, he ſubmitted it, that Mr.

Stone was to be conſidered as the plaintiff's attorney in the court of *King's Bench*, and not Mr. *Cunningham*; and if ſo, the writ was rightly marked with the name of Mr. *Stone*. The court was of the ſame opinion, accordingly diſcharged the rule. 2 *Barnard. K. B.* 83.

Attorney's name ſet muſt be with his authority.

The proceedings were ſet aſide for irregularity, in the want of an attorney's name being duly ſet to them: it appearing that although they had the name of a regular attorney in fact ſet to them, yet it was ſo ſet without any authority from him. *Bur.* 20.

Solicitors in the courts of equity may be admitted attornies without fee or ſtamp.

By ſtat. 23 *Geo.* 2. *c.* 26. §. 15. "Any perſon who hath been or ſhall be *ſworn, admitted and inrolled, a ſolicitor* in any court of equity at *Weſtminſter*, as by the 2 Geo. 2. c. 23. is *directed, may be ſworn, admitted and inrolled an attorney of the court of King's Bench or Common Pleas at Weſtminſter, without any fee for the oath, or any Stamp on the parchment whereon ſuch admittance ſhall be written*, if the judges of the *King's Bench* or *Common Pleas*, or any of them reſpectively, ſhall upon examining ſuch ſolicitor be ſatisfied that he is *duly qualified.*"

Attorney of K. B. not to be admitted of C. P. without a new ſtamp.

An attorney of *K. B.* applied in the treaſury to be admitted an attorney of *C. P.* without ſtamps; but upon looking into the above ſtatute of 2 *Geo.* 2. *c.* 23. wherein no proviſion is made for an attorney of one court to be admitted an attorney of another without duty, though there is a proviſion for ſolicitors of one court of equity in other courts of equity, *and for attornies to be admitted ſolicitors*

without duty, the judges refuſed to admit him without payment of the duty. *Barnes* 30, 31.

Attorney being a priſoner, not to practice.

No attorney, who ſhall be a priſoner, ſhall in his own name, or in the name of any other, commence or proſecute any action or ſuit, (except ſuits commenced before his confinement) and all the proceedings in ſuch action or ſuit ſhall be void and of no effect, and ſuch attorney ſhall be ſtruck out of the roll, and incapacitated from acting as an attorney; as ſhall alſo any attorney permitting him to uſe his name. *Stat.* 12 *Geo.* 2. *c.* 13. §. 9, 10.

Attorney diſmiſſed one court, not to practice in another.

Attornies diſmiſſed by one court from their practice, for miſdemeanors, ought not (after certificate) to be admitted to practice in another court. *Mich.* 1654.

Cannot force an attorney to act againſt his will.

One cannot force an attorney to proſecute or defend a ſuit againſt his will. *Co. Lit.* 197. 10 *Mod.* 263. *contra.*

One cannot retain an attorney in a cauſe where another was formerly retained, without notice.

None ſhall retain an attorney in a cauſe wherein an attorney was formerly retained, without firſt acquainting the attorney that was firſt retained, or the ſecondary in the office.

Nor change attorney without good cauſe, and leave of the court.

One cannot change his attorney in a ſuit without good cauſe, and the leave of the court; and the attorney newly coming in is to take notice, at his peril, of the rules whereunto the former attorney was liable, had he continued. *Mich.* 1654. 7 *Mod.* 50.

Attorney to be paid his fees

The attorney ought to be paid his fees before any other perſon ſhall be admitted to

proceed in the cauſe in which he was formerly retained as an attorney, or he be compelled to deliver up his client's writings and papers to ſuch new attorney, or his client.

before another permitted to proceed in the cauſe.

If the attorney for the plaintiff or defendant die, pending the ſuit, and the party whoſe attorney is dead hath notice given him of it, and will not retain another attorney to proſecute for him, the attorney for the other party may proceed, and is not bound to hinder his client's cauſe for it. *Jenk.* 179. *Style's Pract. Reg.* 13.

If attorney in a cauſe die, the attorney on the other ſide may proceed, if the party whoſe attorney is dead have notice.

One being arreſted in an action of debt, made a warrant to an attorney to acknowledge a judgment for him, and was thereupon diſcharged; but afterwards he revoked the warrant of attorney before the judgment was confeſſed; the court obſerving the cunning practice, commanded the attorney to plead *non ſum informatus*, to the intent that the judgment might be entered, and the judges ſaid they would defend the attorney againſt the party, if he brought an action againſt him. *Hil.* 1 *Car.* 1. *Anonymus Latch* 8.

Warrant of attorney to confeſs a judgment revoked, but attorney ordered to plead non ſum informatus. Poſt.

The plaintiff in a judgment upon receipt of the money, made a letter of attorney to acknowledge ſatisfaction, but before ſatisfaction acknowledged revoked his warrant. It was moved that the attorney might proceed, and that the court might ſave him harmleſs; the court gave rule, that no proceedings ſhould be upon the judgment without motion firſt made in court for it. *Hil.* 14 & 15 *Car.* 2. *B. R. Mariſer* v. *Shelly*, *T. Raym.* 69.

Warrant of attorney to acknowledge ſatisfaction revoked. Ordered, that no proceeding be on the judgment without motion.

Warrant to confeſs a judgment not revocable.

Per Holt C. J. By the courſe of the court a warrant of attorney to confeſs a judgment is not revocable, and the court will give leave to enter up the judgment, though the party does revoke it. *Hil.* 1 *Ann. B. R. Oades* v. *Woodward*, *Salk.* 87. 2 *R. Raym.* 850. *Farr.* 2, 93.

Determinable by death of the party; but if death in vacation, judgment may be entered of precedent term. 2 Str. 718, 882, 1081, 1121. Andrews 53. 1 Barnard. 357, 458, 404.

The authority given by a warrant to enter up a judgment determines by the death of the party. 1 *Vent.* 310. *Salk.* 87. But if the party dies in the vacation, the attorney may enter up the judgment that vacation as of the precedent term, and it is a judgment at the common law as of the precedent term, though it be not ſo upon the ſtatute of frauds (29 *Car.* 2. *c.* 3.) in reſpect of purchaſers, but from the ſigning. *Hil.* 1 *Ann. B. R. Salk.* 87. 2 *R. Raym.* 766, 849. *Farr.* 2, 93. *T. Raym.* 18. *Show.* 91. Of entering judgments *nunc pro tunc*, *vide* 1 *Str.* 639, 427.

Determinable by marriage of the party, when.

If a feme ſole give a warrant to confeſs a judgment, and marry before it be entered, the warrant is countermanded, and judgment ſhall not be entered up againſt huſband and wife; for that would charge the huſband. *Paſ.* 9 *W.* 3. *B. R. Salk.* 399. See *Salk.* 117. *Farr.* 53. *Show.* 91. *Andrews* 53.

Retainer by an attorney of C. P. of an attorney of this court, a ſufficient warrant.

A retainer of an attorney of the *Common Pleas* by an attorney of the upper bench, and *e converſo*, ſhall be a ſufficient excuſe to the attorney ſo retained, acting according to ſuch retainer, and the attorney ſo retaining without warrant from the party, ſhall be liable to puniſhment. *Rule Mich.* 1654.

The

The attornies ought to be governed in the ordinary manner of their practice by the maſter of the office; and if any difference ariſes between them, he is to hear both parties, and to order the matters in difference between them, and they are to ſubmit to him; for the court is not to be troubled but in extraordinary and difficult matters of proceeding. *Attornies in their common way of practice to be governed by the maſter.*

No under ſheriff ought to be an attorney for it is often the cauſe of increaſing of ſuits, and alſo a hindrance in diſpatch of clients cauſes, by reaſon of his double capacity, and intereſt and great power he may have in the county where he is under ſheriff; it is alſo againſt the *ſtat.* 1 *H.* 5. *c.* 4. *Rule Mich.* 1654. *Under ſheriff ought not to practice as an attorney. Ante* 37.

Such attornies as have not been attending their employments in this court by the ſpace of one year laſt paſt, unleſs hindred by ſickneſs, ſhall not be allowed their privilege of attornies. * *Rule Mich.* 1654. *Attorney loſes his privilege by non-attendance.*

* An Attorney of this court brought an action on the caſe for ſcandalous words ſpoken in *Northumberland*, and laid the venue here by virtue of his privilege; a motion was made that the venue might be changed, becauſe the plaintiff hath not attended the court theſe 10 years, neither hath he declared as an attorney, and by his non-attendance he hath loſt his privilege; to which *Glyn* ch. juſt. agreed, and ſaid, that by the new rules his privilege is loſt if he have not attended within a year, therefore let the trial be in *Northumberland*. *Poſch.* 1656. *B. R. Ridley* v. *Carr.* 2 *Styles*, a *MS. fol.* 3. *a.* *An attorney, if he does not declare as ſuch, and has not attended*, &c. *ſhall not have the privilege of laying the venue in* Middleſex.

Plea of Privilege ſuable by bill, and not by writ in *C. B.* Demurrer. Defendant did not alledge he had any clients, or that he proſecuted or defended any cauſes when the action brought, cited *Raſt. ut infra.* *Cur'*:

As

Not to diſcover his client's affairs.

An attorney is not bound to diſcover and give in evidence the contents of a deed ſhewed to him by his client, nor any letters received from his client, nor any inſtructions given him by his client, unleſs he will.

Attornies paying 2s. a term, may file declarations, and ſearch files gratis.

Attornies paying to the clerk of the declarations his fee of 2*s.* a term, may at any time not being prevented by rule of court for that purpoſe, file or ſearch the files for any declarations, without paying any thing for the ſame.

To attend the court on motions.

Upon notice given to any attorney of this court, to attend the court upon any motion to be made, if he ſhall neglect to appear, he ſhall pay 10*s.* to the box. *Paſ.* 1656. *Paſ.* 14 *Car.* 2.

To attend the maſter on references.

Every attorney of this court ſhall perſonally attend the maſter, at times by him to be prefixed, upon notice thereof to him given, to examine cauſes that ſhall be in reference before the maſter; and every attorney making default, ſhall for ſuch default forfeit 10*s.* *Hil.* 15 *Car.* 2.

Undertaking to appear, compellable thereto. Poſt

An attorney accepting a warrant, or ſubſcribing a proceſs, declaration, or warrant, to appear, ſhall be compelled to cauſe an appearance to be entered, or liable to an attachment, or put out of the roll, as the caſe requires, and the party ſhall not be received to countermand ſuch appearance after his retainer.

As long as he is an attorney upon record he ought to have privilege, and if not qualified to be an attorney, the court may be moved to ſtrike him out of the liſt. *Lutw.* 1667. *Moor* 123. *Cro. Eliz.* 392. 1 *Lev.* 262. *Roſt. Ent.* 469. *b. pl.* 1, 2, 3, 6, 8. 9.

tainer. *Mich.* 1654. *Salk.* 86, 87. 5 *Mod.* 205. 6 *Mod.* 16, 42, 86. *Comb.* 2, 299.

Not to be leſſee in ejectment or bail. Poſt

For the prevention of Maintenance and brocage, no attorney ſhall be leſſee in an ejectment, *Mich.* 1654. No attorney of this or any other court to be bail in any action depending in this court. *Mich.* 1654. *Mich.* 14 *Geo.* 2. * Nor a commiſſioner to take bail. *Stat.* 4 *W. & M. c.* 4.

Where may practice in an inferior court.

An attorney of this or any other of the courts at *Weſtminſter* may practiſe in any inferior court, unleſs excluded by charter or preſcription. 1 *Vent.* 11. 1 *Sid.* 410. 2 *Keb.* 477. 1 *Mod.* 23. *Cro. Car. Prowſe's* caſe. 15 *Car.* 1. *Darcey's* caſe. *Stat.* 6 *Geo.* 2. *c.* 27. §. 2.

Cannot be attorney on both ſides.

A man cannot be attorney on both ſides, even though both parties conſent. *Foreſt.* 47.

How long his authority continues.

The authority of an attorney continues until judgment, and for a year and a day afterwards, to ſue out execution, and for a longer time, if the execution be continued.

Attorney's conſent binds his client.

The conſent of the attorney will many times bind his principal, as in 1 *Salk.* 86. *Action ſur aſſumpſit*; plea *Non aſſumpſit infra ſex annos*; replication, and judgment for want of a rejoinder: The plaintiff's attorney conſented to waive the judgment, and accept the rejoinder; but the plaintiff afterwards being informed of the matter, ordered his attorney to inſiſt on the judgment, which he accordingly did: Whereupon the court on motion

* An attorney may be bail, if an houſekeeper, *&c.* though contrary to the rules. 8 *Mod.* 338.

motion held the attorney to what he had consented, which bound the plaintiff, of whom they could take no notice. *Carth.* 412. 1 *Salk.* 70. The attorney's consent to stand to an arbitration will bind his client; but 8 *Co.* 58. *Cro. Jac.* 211. an attorney cannot enter a *retraxit*, because that is a perpetual bar, and in nature of a release, and therefore must be *in propria persona.* 1 *Salk.* 89. He may remit damages. 2 *R. Raym.* 1142.

Retraxit *must be* in propria persona. *Ld. Raym.* 598.

His privilege as to suing and being sued.

An attorney of this court is not to be sued in any other court, nor held to special bail in any action, and may sue by attachment of privilege. 2 *R. Raym.* 1142. If he sues by original, he waives his privilege. 2 *Str.* 837.

Privilege in an action qui tam;

An attorney of the *Common Pleas* was sued in this court in an action *qui tam, &c.* on a penal statute, and was allowed his privilege, for it was at the suit of the party. 1. He might be nonsuited. 2. He might pray a *tales* without a warrant from the attorney general. 3. It should not determine by the demise of the king. *Skin.* 549. *Sed qu.* for if the plaintiff enter a *retraxit*, yet the king may proceed. 1 *R. Raym.* 27. *Salk.* 30, 543.

not in the king's suit;

But an attorney shall not have his privilege in the king's suit. 1 *Rol. Abr.* 274.

nor a real action;

Nor in a real action. 1 *Saund.* 67. *Gilb. Hist. C. P.* 169.

or when he sues, or is sued in auter droit.

Nor when he sues or is sued *in auter droit*, as * heir, executor or administrator. *Hob.* 177. 1 *Salk.* 2, 7. *Latch* 199. *Gilb. Hist. C. P.* 170.

* 12 *Mod.* 316.

Nor when joined with another.

Nor in an action where he joins, or is joined with another. 1 *Vent.* 298. *Dyer* 277.

277. *Godb.* 10. 2 *Rol. Abr.* 275. *Gilb. Hiſt. C. P.* 171.

Nor in an action at the ſuit of another attorney.* 2 *Mod.* 298. 2 *Rol. Abr.* 274. *Nor at the ſuit of another attorney.*

Nor unleſs there be the ſame remedy in this court; as where money is attached in his hands by a foreign attachment in *London*. 1 Saund. 67. 2 Keb. 346. Comb. 427. Gilb. Hiſt. C. P. 169. *Nor unleſs ſame remedy here.*

If an attorney of this court be choſen a conſtable, he may have a writ of privilege for his diſcharge, even though there be a ſpecial cuſtom for perſons to be choſen into that office, in reſpect of their eſtates, or otherwiſe; for no cuſtom ſhall be intended to be more antient than that of this court. *Cro. Car.* 283, 389. *Noy* 112. *March* 30. 1 *Mod.* 13. 1 *Vent.* 16, 29. 2 *Keb.* 477, 508. 1 *Lev.* 265. *Raym.* 179. Not to ſerve on juries. *Trials per pais, c.* 7. §. 3. *ſed vide* a jury of attornies, 30 *Aſſ.* 19. and attornies were ſworn as an inqueſt on the late commiſſions to inquire touching the officers of the ſeveral courts of juſtice, their fees, *&c.* The like has been done on former inquiries touching the ſame matters. For various Writs of Privilege, *vide* Townſend's Tables 452, 453. Cornwall's Tables 432, 433. *Privilege from being choſe conſtable, &c.*

Motion

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* I apprehend this is not to be underſtood of an attorney of the ſame court. Two attornies *B. R.* arreſt each other by *Latitat*, and inſiſt upon bail; but privilege allowed. *Paſ.* 21 *Car.* 2. *Lane* and *Humphins*. *Et vide* 2 *Str.* 1141. But ſee the true diſtinction in *Barnes's Notes C. P.* 35.

Not to put in bail tho' going to Ireland.

Motion, that an attorney going to *Ireland* might put in ſpecial bail, denied. 1 *Mod.* 10.

No cognizance of pleas againſt an attorney.

Conuſance of pleas is not to be granted againſt an attorney of this court, if he ſues by writ of privilege. An act of parliament cannot take away his privilege without expreſs words. *Lit. Rep.* 304. 3 *Leon.* 149. 2 *D. A.* 162. *C. p.* 1.

Male practice, how puniſhable.

Male practice or miſbehaviour in an attorney may be examined in a ſummary way, and he is puniſhable either by attachment, commitment, or being ſtruck out of the roll.

Committed for ſuing out a bill of Middleſex *againſt a peereſs.*

An attorney was committed for ſuing out a bill of *Middleſex* againſt the counteſs of *Huntingdon.* 1 Vent. 298. *Vide* Andrews 275. 2 Stra. 1094.

Cannot bring action 'till a month after bill delivered.

An attorney ſhall not commence an action for fees, charges or diſburſements, until the expiration of one month or more after he ſhall have delivered to the party to be charged therewith, or left for him at his dwelling-houſe, or laſt place of abode, a bill (*a*) of ſuch fees, *&c.* written in a common legible hand in *Engliſh*, (except law terms and names of writs) and in words at length (except times and ſums) ſubſcribed with his proper hand. *Stat.* 2 *Geo.* 2. *c.* 23.

An attorney may write his bill of fees, *&c.* with ſuch abbreviations as are now commonly uſed in the *Engliſh* language. *Stat.* 12 *Geo.* 2. *c.* 13. §. 6. And

(*a*) That ſo the client may have an opportunity of looking into it before he is run to any further expence. *Stra.* 633. Heretofore it was a common thing for an attorney to deliver in his bill at any time pending the ſuit. *Barnard. K. B.* 316.

And upon application to the lord chancellor, &c. or unto a judge, &c. of any of the ſaid courts reſpectively, in which the buſineſs or the greateſt part in value ſhall have been tranſacted, and ſubmiſſion of the party to pay what upon taxation ſhall appear due, the ſaid bill ſhall be referred (though no (b) action commenced thereon) to be taxed without (c) any money being brought into court; and if the attorney ſhall refuſe or neglect to attend, the officer may tax the bill *ex parte*, (and pending ſuch reference, no action to be commenced for the ſaid demand;) and upon the taxation, the party ſhall forthwith pay the ſaid attorney the whole ſum found due thereon, or in default thereof ſhall be liable to an attachment or proceſs of contempt, or other proceeding at the election of the attorney, as the party was before liable unto; and if on the taxation it ſhall be found that the attorney has been over-paid, then the attorney ſhall forthwith refund, and pay to the party all ſuch money as the officer ſhall certify to have been ſo over-paid, or in default thereof be liable to an attachment or proceſs or contempt, or ſuch other proceeding, at the election of the party, as he would have been

Bill to be referred to be taxed.

And what found due to be forthwith paid,

or liable to attachment, &c.

If the attorney be over paid, to refund;

or liable to attachment, &c.

(b) See *Salk.* 89. *pl.* 10.

(c) The late lord chan *King* declared, the year before the paſſing of this law, that he firſt introduced the practice of bringing money into court at law, when he was ch juſt. of *C. B.* and that ſame rule afterwards obtained in *K. B.* for the party being ſtopt from ſuing at law, he thought it reaſonable that the attorney ſhould have ſecurity for his money. *Moſeley* 68. *pl.* 40.

Coſts of taxation.

If bill taxed leſs by a ſixth than bill delivered, attorney to pay coſts. If not, attorney or client, according to the reaſonableneſs of the bill.

been in caſe this act had never been made; and the court is to award the coſts of the taxation to be paid according to the event thereof, that is to ſay, if the bill taxed be leſs by a ſixth than the bill delivered, the attorney is to pay the coſts. If it ſhall not be leſs, the court to charge the attorney or client according to the reaſonableneſs or unreaſonableneſs of the bill. *Stat.* 2 *Geo.* 2. *c.* 23.

But that ſtatute ſhall not extend to any bill of fees, charges and diſburſements, that ſhall become due from any attorney or ſolicitor to any other attorney, ſolicitor, or clerk in court. *Stat.* 12 *Geo.* 2. *c.* 13. §. 6. nor where an attorney is executor. *Comb.* 348. *Andr.* 276. 3 *Vin. Abr.* 308. *pl.* 7. or adminiſtrator, *Barnard. K. B.* 433. nor to a ſpecial agreement, 2 *Barnard. K. B.* 164. this act may be given in evidence. 12 *Vin. Abr.* 76. *pl.* 71.

In order to be admitted an attorney of this court, you muſt make an affidavit of having faithfully ſerved the whole term of five years mentioned in your articles; then take that part of them executed by your maſter to one of the judge's chambers in *Serjeants Inn, Chancery lane*, who will examine you as to your qualifications to be admitted. You muſt get one of Mr. *Owen*'s clerks to attend the judge with the original affidavit of the due execution of the articles. Some day in term you muſt attend *Weſtminſter-Hall* to be ſworn, you then get your admiſſion engroſſed on a treble 40 *s.* ſtampt piece of parchment, and ſigned by the judge before whom you was examined. The expences out of pocket are about ſeven guineas.

Of

Of the four terms.

THE terms are certain portions of the year, in which only the king's juſtices hold plea in the high temporal courts, of cauſes belonging to their juriſdictions in the place thereto aſſigned, according to the antient rules and cuſtoms of the kingdom. *Definition.*

The word *terminus* is of the *Greek* τέρμα, which ſignifieth the bound, end or limit of a thing, here particularly of the time for law matters. *Derivation.*

The ſpace between the terms is named vacation, *a vacando*, as being leiſure from law buſineſs. *Vacation.*

The word *term* is ſometimes uſed for the whole ſpace, including the day of eſſoin, exception and *retorn' brevium*, ſometimes and moſt commonly excluding theſe from the firſt ſitting of the judges in full court, (which is the firſt day of appearance) and this is called *full term* by the *ſtat.* 32 *Hen.* 8. *c.* 21. and *ſtat.* 16 *Car.* 1. *c.* 6. as though the part precedent were but ſemi-term, puiſne-term, or *introitus termini.*

The eſſoin-day from *eſſoine*, or *exonnie*, excuſe, a kind of imparlance, *licentia interloquendi*, or a craving of longer time, is in law the firſt day of term; but in common parlance, the firſt ſitting of the judges in full court is the firſt day of term; ſo where a promiſe was made on the day after the eſſoin-day of *Trinity*-term, to deliver an indenture before the end of *Trinity* term then next enſuing, *Eſſoin-day.*

ſuing, it was held that it ſhould be delivered that term, and not that time twelve months, *Biſhop* and *Harcourt*, *Cro. Eliz.* 310. *Sav.* 124. 1 *And.* 240. 1 *Leon.* 210. 5 *Co.* 37. 2 *Danv. Abr.* 225. *p.* 12. 3 *Danv. Abr.* 46. *p.* 1. A judgment relates to the eſſoin-day, which is the firſt day in law, and not to the *quarto die poſt*, which is but a day of *grace*; *ideo* a judgment of *Hilary* term had precedence of a ſtatute acknowledged on the 22d day of *January*. *Stamford* v. *Cooper*, *Cro. Car.* 102. *Het.* 72. *Hutt.* 95. *Vide Dyer* 200, 361. 34 *H.* 6. *fo.* 20. 22 *H.* 7. *fo.* 7.

In *Eaſter* term all the eſſoin-days of every return are *Sundays*, except the laſt, which is *in craſtino aſcenſionis Domini*; and ſo are all the eſſoin-days of *Trinity* term, except the firſt, which is *in craſtino Sanctæ Trinitatis*.

Of the returns. All the returns in the four terms are either *in craſtino*, *in octabis*, *in quindena*, or *quindecim dies*, *in tres ſeptimanas*, *in unum menſem*, or *in quinque ſeptimanas*, of their reſpective feaſts. Every *octave* and *quindena* is incluſive of the firſt and eighth, or fifteenth day. *Salk.* 626. 6 *Mod.* 250. The *octave* is the ſame day week with its feaſt-day; the *quindena* the ſame day fortnight; the *tres ſeptimanas* the ſame day three weeks; the *unum menſem* the ſame day four weeks; and the *quinque ſeptimanas* the ſame day five weeks with its feaſt-day.

Of the days of the month, on which the returns of the moveable terms are, the court is not obliged to take notice. 1 *Lev.* 196.

Michaelmas *term.* *Michaelmas* term begins on the ſixth day of *November*, if not *Sunday*; if *Sunday*, on the

the ſeventh, (its eſſoin day being the third day of *November*, the morrow of *All Souls*) and ends on the twenty-eighth day of *November*, if it be not a *Sunday*, but if a *Sunday*, then on the morrow following. This term, before the ſtatute 16 *Car.* 1. *c.* 6. began on the ninth day of *October*, and had eight returns, which by that ſtatute were reduced to ſix, and have ſince by the ſtatute 24 *Geo.* 2. *c.* 48. been reduced to four returns.

It appears by a fine taken at *Norwich*, 18 *H.* 3. that this term was then holden there, and began within the octaves of St. *Michael*; for the note of it is, *Hæc eſt finalis concordia facta in curia domini regis apud Norvicum die Martis proxima poſt feſtum Sancti Michaelis anno regni regis Henrici filii regis Johannis* 18. *Coram Tho. de Mulet, Rob. de Lexinte, Olivero, &c.* I obſerve, that the *Tueſday* next after St. *Michael* can (at the fartheſt) be but the ſeventh day after it; and yet it muſt be a day within the octave, whereas before the *ſtat.* 16 *Car.* 1. *c.* 6. the term was not till the third day after the octave; that ſtatute took away two returns from this term, *viz. In octabis Sancti Michaelis*, and *A die Sancti Michaelis in quindecim dies.*

Hilary term begins the three and twentieth day of *January*, if not *Sunday*, and then on the four and twentieth, and is always that day eight weeks on which *Michaelmas* term ended; its eſſoin-day is *January* the twentieth, and it ends the twelfth day of *February*, if not *Sunday*, and then on the next day, which always happens on the ſame day of the week on which *Michaelmas* term began. Hilary *term.*

Hilary term formerly began at *octabis Epiphaniæ*, that is, on the 13th day of *January*, and ended at the *Saturday* next before *Septuageſima*.

Eaſter *term.* *Eaſter* term begins the *Wedneſday* fortnight after *Eaſter* day, its eſſoin-day being the *Sunday* before, but held on the *Monday*, and ends on *Monday* before *Whitſunday*.

Eaſter term formerly began at *octabis Paſchæ*, and ended before the vigil of the Aſcenſion.

Trinity *term.* *Trinity* term begins the *Friday* after *Trinity Sunday*, although that day ſhould happen to be the feaſt of St. *John* the Baptiſt, on the twenty-fourth of *June*, for the term muſt begin on the *Friday* next after *Corpus Chriſti* day, by *ſtat.* 32 *H.* 8. *c.* 21. *Cro. Jac.* 16. its eſſoin day is the *Monday* before, it ends on the *Wedneſday* fortnight after it begins, unleſs it happens to be on the twenty-fourth of *June*, and then on the day after; and the term muſt be adjourned on the *Tueſday* to the *Thurſday* following.

Before the *ſtat.* 51 *Hen.* 3. *ſtat.* 2. this term began *in octab. Pentecoſtes*, which is the day after *Trinity Sunday*; but by that ſtatute this term appears to have had the following returns, *viz.* 1. In the *utas Trinitatis*; 2. In *quindena Trinitatis*; 3. In *craſtino* of St. *John Baptiſt*; 4. In the *utas* of St. *John Baptiſt*; and 5. In *quindena* of St. *John Baptiſt*; ſo that this term then ended about the 12th of *July*. The *ſtat.* 32 *Hen.* 8. *c.* 21. gave this term its former beginning, and enacted, that it ſhould have only four common days of return, *viz.* 1. *In craſtino Sanctæ Trinitatis* (which

(which is the ſame day with *In octabis Penteco-ſtes)*; 2. *In octabis Sanctæ Trinitatis*; 3. *In quindena Sanctæ Trinitatis*; and 4. *A die Sanctæ Trinitatis in tres ſeptimanas*, taking away the returns of *In craſtino Sancti Johannis Baptiſtæ, octabis Sancti Johannis Baptiſtæ, & quindena Sancti Johannis Baptiſtæ*; and alſo enacted, that this term ſhould yearly begin on the *Monday* after *Trinity Sunday*, for the keeping eſſoins, profers, returns, *&c.* and that the *full term* ſhould yearly begin and take its commencement the *Friday* next after *Corpus Chriſti* day; and that the fourth day of return, called *A die Sanctæ Trinitatis in tres ſeptimanas*, ſhould have his return with the fourth day, as is accuſtomed in other like days of return.

Michaelmas term contains three weeks and one day, and hath four returns.

By ORIGINAL.	*By BILL.*
1. On the morrow of *All-Souls.*	On ( ) next after the morrow of *All-Souls.*
2. On the morrow of St. *Martin.*	On ( ) next after the morrow of St. *Martin.*
3. In eight days of St. *Martin.*	On ( ) next after the octave of St. *Martin.*
4. In fifteen days of St. *Martin.*	On ( ) next after fifteen days from the day of St. *Martin.*

Hilary

Hilary term contains three complete weeks, and hath four returns.

1. In eight days of St. *Hilary*.]	On (	) next after the octave of St. *Hilary*.
2. In fifteen days of St. *Hilary*.	On (	) next after fifteen days from the day of St. *Hilary*.
3. On the morrow of the purification of the bleſſed *Mary*.	On (	) next after the morrow of the purification of the bleſſed virgin *Mary*.
4. On the octave of the purification of the bleſſed *Mary*.	On (	) next after the octave of the purification of the bleſſed virgin *Mary*.

Eaſter

Eaſter term contains three weeks and ſix days, and hath five returns.

1. From *Eaſter* day in fifteen days.	On (*Wedneſday*) next after fifteen days from the day of *Eaſter*.
2. From *Eaſter* day in three weeks.	On ( ) next after three weeks from the day of *Eaſter*.
3. From *Eaſter* day in one Month.	On ( ) next after one month from the day of *Eaſter*.
4. From *Eaſter* day in five weeks.	On ( ) next after five weeks from the day of *Eaſter*.
5. On the morrow of the Aſcenſion of our Lord.	On (*Monday*) next after the morrow of the Aſcenſion of our Lord.

Trinity

Trinity term contains twenty days, and hath four returns.

1. On the morrow of the Holy Trinity.	On (*Friday*) next after the morrow of the Holy Trinity.
2. On the octave of the Holy Trinity.	On ( ) next after the octave of the Holy Trinity.
3. From the day of the Holy Trinity in fifteen days.	On ( ) next after fifteen days from the day of the Holy Trinity.
4. From the day of the Holy Trinity in three weeks.	On (*Wedneſday*) next after three weeks from the day of the Holy Trinity.

In

Dies non juridici.

In theſe terms the following days are *dies non juridici:* The ſecond day of *February*, being the feaſt of the Purification, in *Hilary* term; Aſcenſion-day in *Eaſter* term; and the twenty-fourth day of *June*, being the feaſt of St. *John* the Baptiſt, if it happens in *Trinity* term, (unleſs it happens on *Friday* next after *Trinity Sunday*, for then it is *dies juridicus* by the *ſtat.* 32 *H.* 8. *c.* 21. *Far.* 17.) and writs returnable on any of theſe days are not good.

Of the feaſt of St. Martin *in* Michaelmas *term.*

The eleventh day of *November*, being the feaſt of St. *Martin* in *Michaelmas* term, cannot be ſaid to be in or upon any return; and if a writ be made returnable on that day, it muſt be returnable on *Thurſday* the feaſt of St. *Martin*, or any other day of the week it falls on; And if returnable the day after, it muſt be on *Friday* the morrow of St. *Martin*; for between the morrow of *All-Souls*, which is the third day of *November*, and the morrow of St. *Martin*, which is the twelfth day of *November*, one day of the week falls out twice; ſo that if the morrow of *All-Souls* falls on a *Monday*, the next day is *Tueſday* next after the morrow of *All-Souls*, and the next *Tueſday* will be *Tueſday* the feaſt of St. *Martin*, and ſo yearly, according to the day of the week on which the feaſt of St. *Martin* happens.

Sed vide ſtat. 16 Car. 1. 6.

Proceſs by bill returnable on a day certain.

Every bill of *Middleſex*, writ of *latitat*, *alias capias*, *pluries capias*, *habeas corpus ſuper cepi corpus*, *habeas corpus ad faciend' & recipiend'*, and all other proceſs thereupon, both before and after judgment, muſt be returnable on a day certain; as on *Monday* next after the morrow

morrow of *All-Souls*, and may be returnable on an eſſoin, or general return-day in the term-time; but then the day of the week muſt be expreſſed, as on *Friday* in eight days of St. *Martin*.

By original on a general return.

All writs of *capias*, *alias* and *pluries* grounded upon originals out of *Chancery*, and all writs ſubſequent thereto, to the outlawry, writs of *ſcire facias quare executionem non & ad audiendum errores*, upon writs of error out of the *Common Pleas* or other inferior courts, writs of *capias ad ſatisfaciendum*, *fieri facias*, and other judicial writs after judgment affirmed, *de retorno habendo*, *capias in withernam*, and all other writs and proceſs grounded upon any *recordari facias loquelam*, *audita querela*, *accedas ad curiam*, *capias ſi laicus*, and every other judicial writ out of *Chancery*, muſt not be made returnable on a certain day, but on a general return or eſſoin-day, *ubicunque*, as on the morrow of *All-Souls*, whereſoever we ſhall then be in *England*. There muſt be fifteen days between the teſte and return of ſuch writs, except as follows.

And 15 days between teſte and return.

Except by ſtat. 16 Car. 1.

By *ſtat.* 16 *Car.* 1. *c.* 6. §. 7. it is enacted, that the day of return, called *craſtino aſcenſionis Domini*, ſhall be a good return notwithſtanding there be not fifteen days between the *quarto die* of the ſaid return of *craſtino aſcentionis Domini*, and the eſſoin-days of the return of *craſtino Sanctæ Trinitatis*.

And by 2 ſtat. 13 Car. 2. ſtat. 2. c. 2.

By the ſecond ſtatute of 13 *Car.* 2. *ſtat.* 2. *c.* 2. §. 7. it is enacted, That in all perſonal actions, and in all actions of ejectment depending by original writ, there ſhall not need to be fifteen days between the teſte and return

turn of any writ or writs of *venire facias*, *habeas corpora juratorum*, or *distringas juratores*, *fieri facias* or *capias ad satisfaciendum*, and that the want thereof shall not be error. But §. 8. not to extend to any writ of *capias ad satisfaciendum*, whereon an exigent after judgment is to be awarded, nor to a *capias ad satisfaciendum* against the defendant, in order to make the bail liable.

Writ referred to master, for that it was returnable next after weeks of St. *Michael*, without mentioning how many weeks. *Barnard. K. B.* 374. that the return of the writ was not signed by the ch. just. no objection. 2 *Str.* 1063.

Writ delivered to sheriff cannot be returned to the plaintiff unless *supersedeas* procured before return. 2 *Lil. Abr.* 877.

Attachment for rescue must be made returnable at a general return. *Str.* 624.

Delivery of writ into the sheriff's office is a good arrest of a sheriff's bailiff. 2 *Barnard. K. B.* 60.

Writ without a *teste*, or tested on *Sunday*, is not good. 2 *Lil. Abr.* 874. (D) *Latch* 11, 118.

If the King dies in the morning, all process shall be in his name all that day, and not in the name of the new king. 20 *Vin. Abr.* 266. (C) *pl.* 1.

Writ sued out in long vacation, out of term time, is a void writ. *Ld. Raym.* 4. 2 *Ld. Raym.* 1557, 1558. *Fitzgib.* 66. *pl.* 12. unless tested the last day of the precedent term. 2 *Bur. Rep.* 967. *Cr. Jac.* 561. *pl.* 9. *S. P.*

Of writs.

THE uſual leading proceſs when the action is firſt commenced in this court, and not by original out of *Chancery*, nor brought from any inferior court by writ of error, *habeas corpus*, *certiorari*, or *recordari facias loquelam*, is a bill of *Middleſex*, which you are to make out in this form: *Leading proceſs when by bill.*

A writ cannot be ſued out in *Mich.* term, and made returnable in *Eaſter* term following, becauſe in ſuch caſe *Hilary* term will be entirely miſſed, which is irregular, and the cauſe is out of court. *Salk.* 273. 2 *Bac. Abr.* 234. 2 *Rol. Rep.* 442, 443, 444. *Cro. Eliz.* 467. *pl.* 17. 2 *Ld. Raym.* 775. 19 *Vin. Abr.* 225. *pl.* 3. and *Notes.*

Middleſex, *to wit*, It is commanded to the ſheriff, that he take *William Cave* and * *Richard Roe*, if they may be found † in his bailiwic, and keep them ſafely, ſo that he may have their bodies before the lord the king at *Weſtminſter*, on *Monday* next after the morrow of *All-Souls*, to anſwer *Ferdinando* *A bill of* Middleſex.

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* *Richard Roe*, or *John Doe*, are put in when there is but one defendant, to make it agreeable to the printed blanks, which are always in the plural number.

† The words "if they may be found in his bailiwic" omitted in copy of writ as well as writ itſelf, does not make either of them void. *Barnard. K. B.* 375.

nando Hoare in a plea of treſpaſs *; and that he have there then this precept.

By bill.

Lee.

A bill of *Middleſex* is only a precept, not a writ, 2 *Str.* 1069. it cannot be returnable the ſame day it iſſues, 2 *Ld. Raym.* 772. 2 *Salk.* 421. *pl.* 6. 7 *Mod.* 12. it hath only a return, and no *teſte.* 2 *Sid.* 129. 2 *Ld. Raym.* 772. it is not uſual to inſert in the bill of *Middleſex* on what account, or in whoſe right, the party ſues, as in the caſe of executors and adminiſtrators, the caſe of an aſſignee of a bail-bond, and the like, where the proceſs is only to anſwer to *A. B.* 2 *Str.* 1232.

Put the attorney's name, and the day it was ſigned, on the back. And then write a note for the office thus:

Middleſex, to wit, Bill for *Ferdinando Hoare* againſt *William Cave,* treſpaſs, returnable on *Monday*

---

* A bill of *Middleſex* was, to anſwer to the weavers company, and the declaration was in the name of the company, *qui tam* for themſelves, and the poor of a pariſh where the offence was committed: it was moved to ſtay proceedings, becauſe the declaration differed from the proceſs; but the court held it right, it not being uſual to inſert in the bill of *Middleſex* on what account, or in what right the party ſues, as in the caſe of executors or adminiſtrators, the caſe of an aſſignee of a bail-bond, and the like, where the proceſs is only *ad reſpondendum* A. B. 2 Str. 1232.

Monday after three weeks from the day of St. *Michael.*

Robert Richardſon,
20th *October* 1768.

You pay ſix-pence in term, and ten-pence in vacation, for ſigning it.

If the defendant is to be held to bail, you are to add in the writ after the word *treſpaſs*, and before the word *and*, an † *acetiam billæ*, in one of the following forms, according to the nature of the caſe.

As alſo to a bill of the ſaid *F. H.* againſt the ſaid *W. C.* for one hundred pounds of debt, according to the cuſtom of the court of the lord the king, before the king himſelf to be exhibited. *Debt.*

As

† The *acetiam billæ* was firſt introduced by the following ſtatute.

No perſon, who ſhall be arreſted by colour of any proceſs out of the *King's Bench* or *Common Pleas*, in which proceſs the cauſe of action is not expreſſed particularly, and for which the defendant is bailable by the *ſtat.* 23 *H.* 6. *c.* 10. ſhall be compelled to give ſecurity for appearance, in any penalty exceeding 40 *l.* *Stat.* 13 *Car.* 2. *ſtat.* 2. §. 2.

This act ſhall not extend to arreſts upon any writ of *capias utlagatum*, attachment upon reſcous, or attachment upon contempt, or of any *attachment of privilege* at the ſuit of any privileged perſon, or of any other attachment of contempt iſſuing out of either of the ſaid courts; but no ſheriff, &c. ſhall diſcharge any perſon taken upon any *capias utlagatum*, without a *ſuperſedeas* firſt had; and upon the ſaid writs of attachment, ſuch courſe ſhall be taken for ſecurity for appearance as hath been uſed. *Same ſtat.* §. 4.

Aſſumpſit. As alſo to a bill of the ſaid *F. H.* againſt the ſaid *W. C.* for 100 *l.* upon promiſe, according to, *&c.*

Treſpaſs. For taking and carrying away the goods and chattels of the ſaid *F. H.* to his damage of 50 *l.* according to, *&c.*

Detinue. For detaining the goods and chattels of the ſaid *F. H.* to the value of 60 *l.* according to, *&c.*

Trover. For converting and diſpoſing of the goods
Cro. Jac. 667. and chattels of the ſaid *F. H.* to the value of 40 *l.*

Covenant. For breach of covenant to the damage of the ſaid *F. H.* of 50 *l.* according to, *&c.*

If it be an action of debt upon a recognizance of bail on meſne proceſs, there muſt be inſerted the following *acetiam billæ* in the proceſs, (though the defendant is only to be ſerved with a copy of ſuch proceſs, and is not to be arreſted upon it) otherwiſe the defendant or his attorney ſhall not be bound to accept of a declaration in debt upon ſuch recognizance. *Eaſter* 15 *Geo.* 2.

Debt upon a recognizance of bail. And alſo to a bill of the ſaid *F. H.* againſt the ſaid *W. C.* in a plea of debt upon recognizance, according to the cuſtom of the court of our lord the king before the king himſelf, to be exhibited, *&c.*

If there be ſeveral defendants you ſay,

Several defendants. To anſwer *C. D.* of a plea of treſpaſs, and alſo the ſeveral bills of the ſaid *C. D.* againſt the ſaid *A. B.* for 50 *l.* upon promiſe, and againſt the ſaid *E. F.* for 30 *l.* upon promiſe, according to, *&c.*

If

If the defendant cannot be taken on the firſt precept, you make out an *alias*; and if not on that, a *pluries* bill.

Alias *bill.*

Middleſex, *to wit*, It is commanded to the ſheriff, as it was before commanded to him, that he take, *&c.*

Pluries *bill.*

Middleſex, *to wit*, It is commanded to the ſheriff, as it has been oftentimes commanded to him, that, *&c.*

Bill of Middleſex *to the coroners.*

Middleſex, *to wit*, It is commanded to the coroners of the county of *Middleſex*, that they take *Philip D.* and *John L.* if they ſhall be found in their county, and keep them ſafely, ſo that they may have their bodies before our lord the king at *Weſtminſter*, on next after to anſwer *R. W.* Eſq; and *W. S.* Eſq; ſheriff of the county aforeſaid, of a plea of treſpaſs, and that they have there then this precept.

By bill.

Lee.

If the defendant lives in any liberty where the ſheriff of *Middleſex* may not enter, get the ſheriff to direct his warrant to the bailiff of that liberty; and if the bailiff of the liberty does not execute it, you muſt get the ſheriff to return a *mandavi ballivo*; and then you make out a *non omittas* bill of *Middleſex*, whereupon the ſheriff may enter the liberty, and arreſt the defendant.

Middleſex

Non omittas *bill of* Middleſex.

Middleſex, to wit, It is commanded to the ſheriff, that he do not omit by reaſon of * any liberty in his county; but that he take *A. B.* if he may be found in his bailiwick, and keep him ſafely, ſo that he may have his body before the lord the king at *Weſtminſter*, on next after to anſwer to *C. D.* of a plea of treſpaſs, and that he have there then this precept.

By bill.

Lee.

For each of theſe you make out a proper note for the office, and you pay for ſigning the *alias* and *pluries* but two-pence each, either in term or vacation; and for the *non omittas*, as on a firſt bill.

If the defendant lives in any other county than *Middleſex*, (except as after mentioned) you make out a *latitat*, which is in nature of a *teſtatum* bill of *Middleſex*.

Latitat.

GEORGE the third, by the grace of God, of *Great Britain*, *France* and *Ireland*, king, defender of the faith, *&c.* To the ſheriffs of *London*, greeting: Whereas we lately commanded our ſheriff of *Middleſex*, that he ſhould take *A. B.* if he might be found in his bailiwic, and him ſafely keep, ſo that he ſhould have his body before us at *Weſtminſter*, at

* The *non omittas* in *C. B.* is not general as in *B. R.* but only impowers the ſheriff to enter ſome one particular liberty, as thus—*quod non omittas propter aliquam libertatem libertatis ducat' Lancaſt. in com. tuo, quin capias, &c.* 5 Co. 92.

at a certain day now paſt, to anſwer *C. D.* in a plea of treſpaſs, * and alſo to a bill of the ſaid *C. D.* againſt the ſaid *A. B.* for one hundred pounds upon promiſe, according to the cuſtom of our court before us to be exhibited; and our ſaid ſheriff of *Middleſex* at that day returned to us, that the aforeſaid *A. B.* is not found in his bailiwic; whereupon on the behalf of the aforeſaid *C. D.* it is ſufficiently atteſted in our court before us, that the aforeſaid *A. B.* doth run up and down, and ſecret himſelf in your county: Therefore we command you, that you take him, if he may be found in your bailiwic, and ſafely keep him, ſo that you may have his body before us at *Weſtminſter*, †, on next after to anſwer to the aforeſaid *C. D.* of the plea and bill aforeſaid; and that you have there then this writ. Witneſs *William* Lord *Manefield*, at *Weſtminſter*, the day of in the year of our reign.

* *Suit the* ac- etiam bill *to the nature of the action as before directed, fol.* 93. *if the defendant is to be held to bail, or it be on a recognizance of bail, otherwiſe you leave it out, treſpaſs being ſufficient.*

Lee.

† Upon a motion it was held, that there is no certain number of days neceſſary to be between the teſte and return of a ſpecial Latitat, and that even one day is ſufficient, if it can be ſerved. 2 *Str.* 917. 2 *Barnard. K. B.* 60. Proceſs may be ſerved at any time of the return day, altho' it be after the riſing of the court. 2 *Bur. Rep.* 812, 813.

The note for the office.

London, *to wit*, Latitat for *C. D.* againſt *A. B.* treſpaſs, and alſo for 100 *l.* upon promiſe.

Ret.

Anth. Beckwith,
20th *October* 1758.

If the defendant is not to be found on the *Latitat*, you ſue out an *alias capias*; and if not on that, a *pluries capias*.

Alias capias. *GEORGE* the third, by the grace of God, of *Great Britain*, *France* and *Ireland*, king, defender of the faith, *&c.* To the ſheriffs of *London*, greeting: We command you, as we have before commanded you, that you take *A. B.* if he may be found in your bailiwic, and ſafely keep him, ſo that you may have his body before us at *Weſtminſter*, on next after to anſwer *C. D.* of a plea of treſpaſs, and alſo to a bill of the ſaid *C. D.* againſt the ſaid *A. B.* for 100 *l.* upon promiſe, according to the cuſtom of our court before us to be exhibited; and have there then this writ. Witneſs *William* Lord *Mansfield*, at *Weſtminſter*, the in the of our reign.

Lee.

Pluries. The *pluries capias* is the ſame, only inſtead of the words,

" As we have before commanded you," ſay,

" As we have many times commanded you."

If the ſheriff cannot execute your *latitat*, *alias* or *pluries*, by means of any liberty which he may not enter, upon the return of a *mandavi ballivo*, as before, you make out a *non omittas*.

Non omittas. Latitat.

GEORGE the third, by the grace of God, of *Great Britain*, *France* and *Ireland*, king, defender of the faith, *&c.* To the ſheriff of *N.* greeting: We command you, that you do not omit, by reaſon of any liberty in your county, but that you take *R. S.* if he ſhall be found in your bailiwic, and keep him ſafely, ſo that you may have his body before us at *Weſtminſter*, on next after to anſwer *W. A.* of a plea of treſpaſs, and alſo to a bill of the ſaid *W.* againſt the ſaid *R.* for five hundred pounds of debt, according to the cuſtom of our court, before us, to be exhibited; and have there then this writ. Witneſs *William* Lord *Mansfield*, at *Weſtminſter*, the day of in the eighth year of our reign.

Lee.

In each of theſe caſes you make out a proper note for the office in manner before directed; you pay 2 *s.* 6 *d.* for ſigning the *latitat*, whereof 1 *s.* 10 *d.* is for the chief clerk,

and two-pence a-piece to each of the four judges, and you pay 7 *d.* for the ſeal; you pay nothing for ſigning either the *alias*, *pluries* or *non omittas*.

Cinque Port. A *latitat* to any of the *Cinque Ports* muſt be directed *To the conſtable of* Dover *caſtle or his deputy*, whether the *Cinque Port* be in *Kent* or *Suſſex*.

County palatine. A *latitat* may be executed in a county palatine, and is in the following form.

A latitat *to the county palatine of* Cheſter. *GEORGE* the third, by the grace of God, of *Great Britain*, *France* and *Ireland*, king, defender of the faith, &c. To our chamberlain of our county palatine of *Cheſter*, or to his deputy there, greeting: Whereas we lately commanded our ſheriff of *Middleſex*, that he ſhould take *A. B.* if he ſhould be found in his bailiwic, and that he ſhould keep him ſafely, ſo that he might have his body before us at *Weſtminſter* at a certain day now paſt, to anſwer *C. D.* of a plea of treſpaſs; and alſo to a certain bill of the ſaid *C.* againſt *A.* for one hundred pounds upon promiſe, according to the cuſtom of our court, before us to be exhibited; and our ſaid ſheriff at that day returned to us, that the ſaid *A.* was not found in his bailiwic: Whereupon, on the behalf of the ſaid *C.* in our ſaid court before us, it is ſufficiently atteſted, that the ſaid *A.* lurks and ſecretes himſelf in our ſaid county palatine of *Cheſter*: Therefore we command you, that by our writ under the ſeal of our ſaid county palatine to be duly made, and to be directed to the ſheriff of the ſaid county palatine, you command the ſaid ſheriff, that he

he take the ſaid *A.* if he ſhall be found in his bailiwic, and keep him ſafely, ſo that you may have his body before us at *Weſtminſter*, on next after to anſwer the ſaid *C. B.* of the plea and bill aforeſaid; and have there then this writ. Witneſs *William* Lord *Mansfield*, at *Weſtminſter*, the day of in the year of our reign. Raſt. 164. 2 Br. 4. Moyle 17.

Lee.

If to the city of *Cheſter*, ſay *To the ſheriffs of the city of* Cheſter.

If to the county palatine of *Lancaſter*, the directions are thus: *To our chancellor of our county palatine of* Lancaſter, *or to his deputy there, greeting.* Lancaſter.

If to the county palatine of *Durham* thus: *To the reverend father in God——by divine Providence, biſhop of* Durham, *or to his deputy there, greeting:* And inſtead of ſaying, *under the ſeal of our ſaid county palatine*, ſay, *under the ſeal of your biſhopric.* Durham.

Latitat being treſpaſs and aſſault only, and declaration, treſpaſs, aſſault and battery, judgment ſet aſide. *Barnard. K. B.* 226, 329.

Where the true time of ſuing out a *latitat* is material, it may be ſhewn notwithſtanding the *teſte*, 2 *Bur. Rep.* 963. It was not ſettled, till many years after the ſtatute 21 *Jac. c.* 16. of the limitation of actions, that the plaintiff might reply a *latitat*; and now, tho' the *latitat* is holden to ſave the bar within the equity and reaſon of the ſtatute, yet it muſt be taken out with intent to declare in that action, and

must be continued to the filing the bill. 2 *Bur. Rep.* 961. The *teste* of a *latitat* sued out in vacation must be of the preceding term; this writ is a good commencement of a penal action. 2 *Bur. Rep.* 964.

Latitat may be tested before plaintiff's cause of action.

A man may take out a *latitat* before the money is due; but the party must not be arrested upon it before; and this differs from an original, which, if it bears teste before the money is due, is abatable; but the *latitat* is only to bring the defendant in custody, that the plaintiff may declare against him by bill, and after that the proceedings upon the *latitat* cease. *Vent.* 28. *Cro. Jac.* 561. *pl.* 9. but if an original writ bears date before the cause of action, it is abatable. 2 *Bur. Rep.* 967.

The day and year of signing process to be set down on such process.

Every officer or clerk of the court, who shall sign any writ or process before judgment for the arresting any person is, at the signing thereof, to set down on such writ or process, the day and year of his signing the same, which shall be entered in the remembrance, or book, where the abstract of such writ or process shall be entered; upon pain of forfeiting ten pounds for every such neglect; to be recovered by any person that will sue for the same. *Stat.* 5 & 6 *W. & M. c.* 21. §. 3. and 9 & 10 *W. c.* 25. §. 42.

The name of attorney to be written on every writ, &c.

Every writ or process for arresting the body, and every writ of execution, and every warrant which shall be made out upon any such writ, process or execution, shall, before the service or execution thereof, be subscribed or indorsed with the name of the attorney who sues forth the same; and where such attorney is not the person immediately retained or employed by the plaintiff, then also with

the name of the attorney ſo immediately retained or employed; and every copy of any writ or groceſs that ſhall be ſerved upon any defendant, ſhall, before the ſervice thereof, in like manner be ſubſcribed or indorſed with the name of the attorney, who ſhall be immediately retained or employed by the plaintiff. *Stat.* 2 *Geo.* 2. *c.* 23. §. 23. for regulating attornies, *&c.* made perpetual by 30 *Geo.* 2. *c.* 19. §. 75. *Bur. Rep.* 20.

Error of proceſs cured by appearance. *Str.* 155. 2 *Str.* 989. *Salk.* 59. *pl.* — 10 *Mod.* 86. 2 *Bernard. K. B.* 346. 2 *Kel.* 161. *pl.* 134.

The not indorſing the name of the attorney on the warrant made upon any writ, proceſs or execution, ſhall not vitiate the ſame; but ſuch writ *&c.* ſhall be valid, provided the writ be regularly ſubſcribed or indorſed; and the ſheriff or other officer, who ſhall make out any warrant, and not ſubſcribe or indorſe the attorney's name, ſhall forfeit 5*l.* to be aſſeſſed as a fine by the court; one moiety to the king, the other to the party grieved. *Stat.* 12 *Geo.* 2. *c.* 13. §. 4.

No ſpecial writ where cauſe of action under 10*l.*

Where the cauſe of action does not amount to ten pounds or upwards, no ſpecial writ or proceſs, ſpecially therein expreſſing the cauſe or cauſes of action, ſhall be ſued forth or iſſued, in order to compel any perſon to appear thereto; and if any ſuch be ſued forth, the proceedings and judgment thereon ſhall be void, and the attorney or officer of the court, ſuing forth or iſſuing the ſame, ſhall forfeit ten pounds to the perſon or perſons aggrieved thereby. *Stat.* 5 *Geo.* 2. *c.* 27. made perpetual by *ſtat.* 21 *Geo.* 2. *c.* 3.

What perſons may not be held to ſpecial bail.

Peers and members of parliament.

PEERS of the realm, members of the houſe of commons, and other perſons intitled ſo the privilege of parliament, are not to be held to bail, but to be proceeded againſt in manner herein after mentioned.

No acetiam *writ againſt an heir, executor or adminiſtrator.*

No writ with the clauſe of *acetiam* is to be ſued forth againſt an heir, executor or adminiſtrator, ſo as to oblige him to put in ſpecial bail. *Mich.* 15 *Car.* 2. 2 *Brownl.* 293. 3 *Bulſt.* 316. *Cro. Jac.* 352. *Cro. Car.* 59. *Litt. Rep.* 2, 3, 81. 1 *Sid.* 63, 418. 1 *Lev.* 145, 245, 268. 2 *Lev.* 204. 2 *Jones* 82. 1 *D. A.* 681, 682. *Salk.* 98.

When bail by an executor or adminiſtrator on a devaſtavit *ſuggeſted.*

Where upon a judgment againſt an executor or adminiſtrator, an execution is taken out, and the ſheriff hath returned a *devaſtavit*, the defendant on an action of debt brought on the judgment ſhall put in ſpecial bail, becauſe of the ſheriff's return, but not upon a bare ſuggeſtion of a *devaſtavit*, for there common bail ſhall ſerve. *Hil.* 4 *W. & M. B. R. Duprat* v. *Teſtard. Carth.* 264. *Comb.* 206.

Attornies, when to be held to bail.

An attorney is not to be held to bail, except at the ſuit of an attorney of another court, or where he is ſued jointly with others; but as to his privilege more particularly, *vide antea, fol.*

A feme covert, when to be diſcharged on common bail.

If an action be brought againſt baron and feme, and ſhe only is arreſted, ſhe ſhall be diſcharged. *Cro. Jac.* 445. *Latch* 224.

Stiles

(*Stiles* 475. *contra*,) but not without common bail. *Salk.* 115. *Comb.* 355. 1 *Mod.* 8. If both of them be arreſted, ſhe ſhall be diſcharged, and the huſband ſhall be obliged to put in bail for her, as well as for himſelf. 2 *Strange* 1272. (and 1 *Vent.* 49. denied to be law) 1 *Lev.* 216. If the huſband only is arreſted, and not the wife, he ſhall be obliged to put in bail for both. *Gouldſh.* 127. *Salk.* 115. *vide Cro. Eliz.* 307. 2 *D. A.* 469. *p.* 2, 5, 6, 8. *Latch* 224. *Dyer* 278. *b.* *Litt. Rep.* 18. *Hutt.* 86. *Cro. Car.* 58, 59. 1 *Sid.* 20, 21.

Whether one partner muſt put in bail for another, *vide* 1 *Mod.* 45. *Partners.*

That no perſon, who ſhall liſt himſelf to ſerve on board any of his majeſty's ſhips of war, ſhall be held to bail, but on affidavit that the ſum juſtly due amounts to 20*l.* *Vide ſtat.* 1 *Geo.* 2. *ſtat.* 2. *c.* 14. §. 15, 16. 31 *Geo.* 2. *c.* 10. §. 17. *Seamen.*

And that ſoldiers are not liable to be arreſted on any proceſs or execution, unleſs the original ſum or cauſe of action amounts to 10*l.* over and above all coſts. See *ſtat.* 7 *Geo.* 3. *c.* 10. §. . No perſon liſted according to *ſtat.* 29 *Geo.* 2. *c.* 4. §. 14. ſhall be taken out of his majeſty's ſervice by any proceſs, other than for ſome criminal matter; but he may be ſurrendered by his bail, in their own diſcharge. *Bur. Rep.* 339, 340. A volunteer, under *ſtat.* 30 *Geo.* 2. *c.* 8. is not privileged from arreſts; but perſons compelled againſt their wills are privileged by *ſect.* 4. of that act. *Bur. Rep.* 466. *Soldiers.*

If

Defendant discharged from arreſt ſhall not be arreſted again at the ſame time at the ſame plaintiff's ſuit. 1 Str. 439. 2 Str. 1039, 1209, 1216.

If any defendant ſhall be legally delivered from any arreſt upon meſne proceſs, he ſhall not be again arreſted at the ſame time by virtue of any other proceſs at the ſuit of the ſame plaintiff; upon pain that every attorney acting to the contrary ſhall be put out of the roll, and the plaintiff and attorney ſhall be further puniſhed as the court ſhall think fit. *Mich.* 15 *Car.* 2.

In what actions ſpecial bail is or is not required.

No bail upon a penal ſtatute. &c.

In all actions upon penal ſtatutes, as upon the 13 *Eliz.* of fraudulent conveyances, *&c.* the defendant need not put in ſpecial bail. *Yelv.* 53. ſaid to be according to the practice in *B. R.* 1 *D. A.* 680. *p.* 1.

In an information or action upon a penal ſtatute brought by a perſon *qui tam*, *&c.* the defendant need not find ſpecial bail, if it is not upon the *ſtat.* 11 *&* 12 *W.* 3. for an offence in the exportation of wool, and then not only the penalty but the cauſe of action ought to appear in the writ, and the defendant ought not to be arreſted upon a general *latitat* with an *acetiam billæ*, *&c.* *Trin.* 12 *W.* 3. *B. R. Preſgrave* and ——. *Comyns* 75. *Vide* 2 *Str.* 1079. *Andrews* 70. Bail on *ſtat.* 9 *Annæ*, *c.* 14. for Money won at play, by the loſer againſt the winner, being a remedial law and at the ſuit of the party grieved.

No bail in covenant required, unleſs, &c.

In an action of covenant the defendant is not bound to put in ſpecial bail, unleſs the plaintiff has obtained a rule of court, or an order

order from a judge for that purpoſe, or unleſs the covenant be for payment of money. *Vide Mich.* 1654.

In debt on a bond to perform covenants, no bail but with regard to the damages by the breach.

In debt upon a bond to perform covenants no bail ſhall be given, but with reſpect to the breaches and the damage done thereby; but the meaſure of that ſhall be taken from the plaintiff's oath. *Hil.* 1 *W.* 3. *B. R. Anonymous. Salk.* 100. 1 *Sid.* 63.

No bail in account 'till judgment quod computet.

In account the plaintiff inſiſted upon ſpecial bail, becauſe the defendant would go beyond ſea, but was denied by the court; for in account no ſpecial bail is to be found till judgment *quod computet.* 1 *Lev.* 300. *Sacus* in debt on account. 2 *Rol. Rep.* 53. *Noy* 28.

No bail in battery, &c. without order.

In battery, conſpiracy, falſe impriſonment, no ſpecial bail of courſe, without ſpecial motion and order. *Mich.* 1654. 1 *Sid.* 276, 307. 1 *Mod.* 2.

An order may be obtained from a judge at his chambers for ſpecial bail in any of theſe caſes, on a proper affidavit of the fact.

Affidavit of an aſſault in order to procure a judge's order for holding the defendant to bail.

A. B. of *C.* in the county of *D.* clerk, maketh oath, that on *Friday* the ——— day of ——— laſt paſt, he this deponent going to view whether the tithe hay on the land of *E. F.* of *C.* aforeſaid, were ready to be ſet forth, he the ſaid *E. F.* did then in the ſaid field, without any reaſonable cauſe, in a violent manner aſſault, beat and throw this deponent on the ground, this deponent making no oppoſition or reſiſtance againſt the ſaid *E.* but this deponent being reſcued by ſome perſons preſent from the ſaid *E.* the ſaid *E.* did again,

again, as ſoon as he got looſe from the perſons who reſcued this deponent, a ſecond time aſſault, throw down, beat and kick this deponent about the head and body, ſo that the blood guſhed out at this deponent's ears, which occaſioned to this deponent the loſs of his ſpeech and hearing for ſome time, ſo as to render him incapable of performing his duty in the aforeſaid pariſh, he being miniſter of the ſame; and this deponent further ſaith, that the ſaid *E.* hath often declared, that it was no ſin for any man to kill or deſtroy this deponent.

Sworn, &c. *A. B.*

No bail in ſlander, except, &c.

In ſlander no ſpecial bail, except in ſlander of title, wherein to be left to the direction of the judges. *Mich.* 1654.

Bail in an action for ſlandering a woman of quality.

In an action on the caſe for calling a woman of quality whore, whereby ſhe loſt her marriage, it was ruled on motion, that the defendant ſhould find ſpecial bail; though generally in actions for words no ſpecial bail is uſual, yet on the circumſtances of the caſe the court may compel the defendant to find ſpecial bail.——And in caſe of executors, though they do not find bail in ordinary caſes, yet in ſpecial caſes they ſhall find bail, as where it appears they have waſted the goods. 1 *Lev.* 39. *Vide* 1 *Mod.* 16. *Carth.* 264.

Bail in ſcandalum magnatum.

Foſter moved, that the defendant might put in good bail to the plaintiff's action; for although the action be but for words, yet the ſame being ſpoken againſt an earl, the court may compel ſpecial bail; and it was granted *niſi.*

niſi. *The earl of Stamford* againſt *Gordal*, *Raym.* 74. 2 *Mod.* 215. 1 *Brownl.* 90. 1 *Sid.* 183.

If an action be brought upon a judgment, where the debt or damages recovered without the coſts amount to ten pounds or upwards, the defendant muſt give ſpecial bail; but it is otherwiſe where they amount to ten pounds or upwards by the addition of coſts. *No bail for debt on judgment, unleſs, &c.* Andrews 15. 2 Str. 975, 1077.

If an action of debt be brought on a bail-bond for recognizance of bail, the defendant ſhall not be held to ſpecial bail, for the conſequence of that would be bail *ad infinitum.* *Nor in debt on a bail-bond or recognizance of bail,*

In an action upon a replevin bond, common bail ſhall be filed. *Trin.* 10 *W.* 3. *B. R. Dux Ormond* v. *Brierly*, *Salk.* 99. *Carth.* 519. *Holt* 127. *Caſes B. R.* 320, 380. *or replevin bond.*

Holt ch. juſt. ſaid, that he had known it held by the court, that where the plaintiff was nonſuit for want of a declaration, and afterwards brought another action for the ſame cauſe, that he ſhould have but common bail to the ſaid action. *Trin.* 13 *W.* 3. *B. R. Almanſon* v. *Davila*, 1 *R. Raym.* 679. *contra.* Str. 439. *After nonſuit only common bail in a new action.* Comyn 94.

No ſheriff or other officer within the principality of *Wales* or counties palatine, upon any writ or proceſs out of any of his majeſty's courts at *Weſtminſter*, ſhall hold any perſon to ſpecial bail, unleſs an affidavit be firſt made and filed in court, ſignifying the cauſe of action, and that the ſame is 20 *l.* and upwards, and bail ſhall not be taken for more than the ſum expreſſed in ſuch affidavit. *Stat.* 11 & 12 *W.* 3. *c.* 9. §. 2. *No ſpecial bail on proceſs into* Wales *or the counties palatine, without affidavit of the cauſe of action, and that the ſame amounts to* 20 l. *and upwards.*

No

No ſpecial bail in a ſuperior court where the cauſe of action is under 10*l.*

No perſon ſhall be held to ſpecial bail upon any proceſs out of a ſuperior court, where the cauſe of action ſhall not amount to the ſum of 10*l.* or upwards.

Copy of proceſs to be ſerved.

But in all caſes where the cauſe of action does not amount to ten pounds or upwards, the defendant ſhall not be arreſted, but be ſerved perſonally with a copy of the proceſs. *Stat.* 12 *Geo.* 1. *c.* 29. Made perpetual by *ſtat.* 21 *Geo.* 2. *c.* 3.

Engliſh *notice on ſuch copy.*

Upon every copy of ſuch proceſs ſo ſerved on any defendant, there ſhall be written an *Engliſh* notice to the defendant of the intent and meaning of ſuch ſervice to the effect following, *viz.*

Form of it.

A. B. You are ſerved with this proceſs to the intent, that you may by your attorney appear in his majeſty's court of *King's Bench* at the return thereof, being the day of (the day of the return) in order to your defence in this action.

The proceedings were ſet aſide, for that the notice under the writ was not according to *ſtat.* 5 *Geo.* 2. *c.* 27. §. 4. [perpetuated by *ſtat.* 21 *Geo.* 2. *c.* 3.] by which the *name* of the defendant is to be ſet out at the head of the notice; whereas in this caſe the defendant's name was omitted, for it was only generally, "*You are ſerved*, &c." and not, A. B. *you are ſerved*, &c." 2 *Kel.* 131. *pl.* 107.

The notice, at the bottom of the proceſs, to appear at the return thereof, being the 14th of *June*, without ſaying, this inſtant, or

or expreſſing the year of our Lord, or of the king, held right. 2 *Str.* 1233.

On ſervice of writ, it is not neceſſary to ſhew the defendant the original writ. *Barnard. K. B.* 374. 2 *Str.* 877. But *quære*, for the affidavit of ſervice expreſsly ſets out, that the perſon who ſerved the party ſhewed him the writ.

No fee is to be taken for this notice.

Five ſhillings for making and ſerving ſuch iſſue.

No attorney, bailiff or other perſon, ſhall take or demand more than five ſhillings for making and ſerving a copy of ſuch proceſs. 5 *Geo.* 2. *c.* 27. Made perpetual by *ſtat.* 21 *Geo.* 2. *c.* 3.

Of ſerving proceſs in a county palatine.

It was the opinion of this court, that the ſervice of a copy of a *latitat* iſſuing out of this court into a county palatine was good, and that the party need not have a mandate from the chamberlain of the county palatine upon the *latitat*; this proceeding is grounded on the *ſtat.* 12 *Geo.* 1. *c.* 29. & 5 *Geo.* 2. *c.* 27. The latter act explains the former, and the words in the laſt mentioned ſtatute, *viz.* Provided nevertheleſs, that all proceſs ſhall be executed by the proper officer of each franchiſe, cannot be conſtrued to extend to counties palatine, but to ſuch franchiſes or particular diſtricts in each county, into which the ſheriff cannot enter, but by writ of *non omittas*. The act ſays, that ſervice of ſuch proceſs, if the defendant does not appear, is to be confirmed by an affidavit made before a judge, or commiſſioner of the court from whence the proceſs iſſued; which, if the chamberlain's mandate was to iſſue on the *latitat*,

latitat, and a copy of that ſerved on the defendant, muſt be ſworn before the chamberlain, or a baron of the *Exchequer* there, and conſequently could not be read in this court. 2 *Barnard. K. B.* 318, 337, 398. 2 *Kel.* 160. *pl.* 133. *Andr.* 199.

If cauſe of action be 10l. *or upwards, affidavit to be made of it.*

In all caſes where the cauſe of action amounts to ten pounds or upwards, (and the plaintiff would compel the defendant to give ſpecial bail,) *affidavit* is to be made and filed *of the cauſe of action*, and the ſum or ſums ſpecified in ſuch affidavit muſt be *indorſed on the back* of the writ or proceſs; for which ſum or ſums ſo indorſed, the ſheriff or other officer, to whom ſuch writ or proceſs is directed, ſhall take bail, and for no more. 12 *Geo.* 1. *c.* 29.

King's Bench.

Samuel Anderſon
againſt
Jeremiah Waring.

Affidavit to hold to bail.

Samuel Anderſon of, *&c.* the plaintiff in this cauſe, maketh oath, that the defendant, *Jeremiah Waring*, is juſtly and truly indebted to this deponent in the ſum of fifty pounds for goods ſold and delivered by this deponent to the ſaid *Jeremiah Waring*.

Samuel Anderſon.

Sworn the day of before.

Before whom to be made.

This affidavit may be made before any judge of the court or commiſſioner, although ſuch commiſſioner be concerned as attorney for

for the plaintiff, *Eaſter* 15 *Geo.* 2. or before the officer who iſſues the writ or proceſs, or his deputy, for which only one ſhilling is to be paid; and ſuch affidavit is to be filed with the ſaid officer or his deputy.

The affidavit to hold to ſpecial bail muſt be *poſitive*; a poſitive oath of the debt is required both by the act of parliament, and by the eſtabliſhed rule of the court. 2 *Bur. Rep.* 654.

What affidavit not ſufficient to hold to bail.

Affidavit that the defendant borrowed of the plaintiff 2000 *l.* on bottomree, which money is now due and owing to this deponent by virtue of the ſaid *bond as thereby may appear*. Objected, that this was no oath of the debt; for ſuppoſe every penny is paid, and a ſeparate receipt taken for it; yet upon the face of the bond the whole will appear due. *Et per Curiam*, It is not ſufficient. And the court † refuſed to receive a ſupplemental affidavit. 2 *Str.* 1157. 2 Str.

Affidavit by a Merchant in *London*, that the defendant owed the plaintiff 270 *l.* as appears by an affidavit made by the plaintiff in *Amſterdam*, which the deponent believes to be true. *Per curiam*, There can be only common bail; for the oath abroad can be no ground for our proceſs, and then there is nothing but the belief of a third perſon which is not ſufficient. 2 *Str.* 1209. 2 Bur. Rep. 655. *S. P.*

The like reſolution on an affidavit made by the plaintiff's book-keeper, that the defendant was indebted to the plaintiff in 3400 *l.* for money had and received by the defendant

† Such affidavit admitted. *Andr.* 71.

to the uſe of the plaintiff, *as this deponent really believes.* 2 Str. 1226. Affidavit by an executrix, that the defendant was indebted to her teſtator (ſo much) as appears by the books of her teſtator. Held inſufficient, and common bail ordered. 2 *Str.* 1219. Swearing only to belief, though with a reference to accounts ſent from abroad, where the debt aroſe, will not do. 2 *Bur. Rep.* 655. *quære*; for an affidavit to hold to ſpecial bail was only "that the defendant was indebted to the plaintiff, in, *&c.* as he computes it" was thought ſufficient by the only two judges then in court. 2 *Bur. Rep.* 1032. Poſitive oath, that *J. S.* or *H. W.* is indebted, ſufficient. 2 *Kel.* 155. *pl.* 127. Aſſignees of a bankrupt muſt ſwear poſitively as well as other plaintiffs. 2 *Barnard. K. B.* 284. 2 *Kel.* 135. *pl.* 106. The plaintiff on going beyond ſea made an affidavit 4 *July* 1744. that the defendant was indebted to him in 277 *l.* for goods ſold and delivered. On this affidavit proceſs taken out 9 *May* 1747. and marked for bail. But common bail was ordered, for though he owed ſo much in 1744. he might not owe it in 1747. And the act requires oath of a ſubſiſting debt at the time of ſuing out the proceſs. 2 *Str.* 1270.

Of ſpecial bail in Wales *and counties palatine.*

By *ſtat.* 11 & 12 *W.* 3. *c.* 9. Sheriffs are not to take ſpecial bail in *Wales*, or counties palatine, on proceſs from *Weſtminſter Hall*, unleſs a debt of 20*l.* is ſworn to. And this is ſtill in force notwithſtanding *ſtat.* 12 *Geo.* 1. *c.* 29.

Of

Of common bail.

A defendant who has been ſerved with a copy of proceſs, is within eight days after the return of the proceſs to file common bail in the following form.

A common bail-piece.

Michaelmas term in the twelfth year of king *George* the ſecond.

Middleſex *(to wit)* A. B. *is delivered on bail upon a* cepi corpus.

To John Doe *of* London, *Gent.*
and
Richard Roe, *of the ſame place, Gent.*

Robert Richardſon, *attorney for defendant.* } *At the ſuit of* C. D.

This is to be written on a piece of parchment of the above form, ſtamped with a double ſixpenny ſtamp; you pay the clerk of the common bails for filing this, 1 *s.* 2 *d.* if filed within the term, or ſix days after, otherwiſe you pay him four-pence more as a *poſt terminum.*

If defendant does not file common bail, plaintiff may on affidavit of ſervice.

Where the cauſe of action does not amount to ten pounds or upwards, and the defendant is ſerved with a copy of the proceſs, and doth not appear at the return, or within eight days after the return thereof, the plaintiff upon making and filing an affidavit of the perſonal ſervice of the proceſs, may file common bail for the defendant, and proceed as if common bail had been filed by the defendant. This affidavit may be made before any judge or commiſſioner of this court, authorized to take affidavits, or before the clerk of the common bails, *ſtat.* 5 *Geo.* 2. *c.* 27. and is to be filed with the clerk of the rules or bails *gratis.*

Eight days to file common bail reckoned excluſive.

The eight days allowed for the defendant to file common bail in, are to be reckoned excluſive of the day of the return of the writ; as if the writ be returnable on *Wedneſday* next after eight days of St. *Hilary*, the defendant has the *Thurſday* ſevennight following, and the plaintiff cannot file bail for him 'till the *Friday*.

King's Bench. *C. D.* againſt *A. B.*

Affidavit of ſervice of proceſs.

E. F. of, *&c.* Gentleman, maketh oath, that he, this deponent, on the day of at in the county of perſonally ſerved the defendant *A. B.* with the writ or proceſs hereunto annexed, by ſhewing him the ſaid annexed writ or proceſs, and at the ſame time delivering to him a true copy thereof, on which copy was ſuch *Engliſh* notice in writing

ting of the intent and meaning of ſuch ſervice, as by the ſtatute in that caſe made is required.

Sworn, &c. *E. F.*

If common bail filed by plaintiff, to be ſo marked on bail-piece.

In all caſes where common bail ſhall be filed by the plaintiff for the defendant, by virtue of the late *act for preventing frivolous and vexatious arreſts*, theſe words ſhall be written on the bail-piece, *viz.* (*filed according to the ſtatute*) or words to the like effect. *Mich.* 10 *Geo.* 2.

Attorney who appears is to file common bail, and give notice.

Every attorney, who ſhall appear for any defendant in any action in which bail is not required, ſhall duly file common bail for ſuch defendant of the term of which he appears, and give notice thereof to the plaintiff or to his attorney.

Attorney ſhall not be compelled to file common bail, unleſs he has undertaken in writing.

No attorney ſhall be compelled to appear or file common bail for any defendant in this court, unleſs ſuch attorney hath by a note in writing undertaken ſo to do, and ſuch note be produced by the plaintiff's attorney; but if any attorney hath accepted a warrant to appear for the defendant, (which warrant ſhall in no wiſe be revoked) or hath ſubſcribed the ſame, and does not file common bail accordingly, ſuch attorney ſhall be compelled to file common bail of the proper term, and receive a declaration, and plead thereto; and in default of pleading, judgment may be entered by default (a rule to plead having been firſt entered); for the neglect of the defendant or his attorney ſhall not tend to the plaintiff's prejudice.

Common bail to be filed on

Where judgment is confeſſed by warrant of attorney, common bail ought to be filed

judgment by confeſſion.

for the defendant, on pain of forfeiting 10 *s.* to the box. *Hil.* 1 *W. & M.*

Voluntary appearance invalid, unleſs proceſs ſued out in 14 *days.*

If the defendant ſhall voluntarily appear at the ſuit of any plaintiff in any action here in court, ſuch appearance ſhall be of no effect, unleſs ſome proceſs be ſued out within fourteen days next after ſuch appearance. *Trin.* 4 *W. & M.*

Special bail is written in parchment in the following form on a double twelve-penny ſtamp.

A ſpecial bail-piece.

Michaelmas term in the twelfth year of king *George* the ſecond.

London *(to wit)* A. B. *is delivered on bail upon a* capi corpus.

To C. D. *of* Cheapſide, London, *Mercer, and* E. F. *of* Fleet-ſtreet, London, *Gent.*

{ *Naming the bail, with their places of above and additions.* }

J. K. *attorney.* } *At the ſuit of* G. H.

At the taking the recognizance the condition is expreſſed to the bail as follows:

The condition of the recognizance.

You do jointly and ſeverally undertake, that if the defendant *A. B.* ſhall be condemned in this action at the ſuit of the plaintiff *G. H.* he ſhall ſatisfy the coſts and condemnation, or render himſelf into the cuſtody of the marſhal of the *Marſhalſea* of the court, or you will pay the coſts and condemnation for him.

Fees on putting in bail.

Putting in bail in term 4 *s. viz.* Maſter of the office 2 *s.* 6 *d.* Judge's clerk 1 *s.* Porter 6 *d.*

In vacation 5 *s. viz.* Maſter of the office 2 *s.* 6 *d.* Judge's clerk 2 *s.* Porter 6 *d.*

See for bail on *habeas corpus*, proceedings by original and writ of error, under thoſe heads.

Four days to put in bail in London *and* Middleſex, *and ſix days in any other county.*

If the defendant be arreſted in *London* or *Middleſex* by proceſs out of this court, and gives a bail-bond for his appearance at the return of the proceſs, he has four days after the return to put in ſpecial bail; and if arreſted in any other county he has ſix days, and in the mean time no proceedings ought to be upon the bail-bond. *Trin.* 6 *G.* 3.

Days in this court reckoned excluſive.

The rule does not expreſs whether the four days and ſix days are to be incluſive or excluſive of the day of the return of the proceſs; and in like manner it is not aſcertained in any of the rules of the court, which require a matter to be done or not to be done within ſo many days, how the days are to be reckoned, whether incluſively or excluſively, but the practice in almoſt all caſes is to reckon days excluſive; as in the *Common Pleas* they

In the Common Pleas *incluſive.*

are reckoned inclusive, and so the eight days, which the defendant has by the late act to appear after the return of the process, are in this court counted exclusive, in that court inclusive of the day of the return of the process; which difference in reckoning is, in the short terms, a means of gaining the term, and gives the suitor in the one court an advantage which the suitor in the other has not.

Sunday, *if the last day, not to be counted.*

If the fourth or sixth day happens to fall on a *Sunday*, the defendant has *Monday* the fifth or seventh day to put in his bail. 2 *Str.* 782, 914.

No attorney to be bail.

No attorney of this or any other court shall be bail in any action or suit depending in this court. *Mich.* 14 *Geo.* 2. *Mich.* 1654.

No bailiff to be bail.

No bailiff, sheriff's officer, or other persons concerned in the execution of process, shall be permitted to be bail in any action or suit depending in this court. *Mich.* 14 *Geo.* 2. 2 *Stra.* 890. *Barnard. K. B.* 417.

Notice of bail in writing.

Where special bail is put in *de bene esse*, before any judge or commissioner, the defendant is forthwith to give notice thereof in writing to the plaintiff or his attorney, and of the names of such bail, with their places of abode and additions; and if no exception be taken to such bail, and entered in the judge's book within twenty days next after such notice, then upon oath thereof, (for which no fee is to be taken) such bail shall within four days next after be filed by the attorney for the defendant. *Mich.* 16 *Car.* 2. *Mich.* 8 *Annæ.*

Exception to be in 20 *days.*

An

An exception entered after the expiration of the ſaid 20 days, ſhall be of no validity. *Mich.* 8 *Annæ.* *After of no validity.*

If the plaintiff accepts the bail, he may take away the bail-piece from the judge's chamber, and file it for his own expedition; but after 23 days it becomes abſolute, and the defendant takes it away and files it. *Comb.* 263.

If the defendant ſurrenders in diſcharge of his bail, the bail-piece ſhould be marked and diſcharged, otherwiſe the plaintiff may proceed againſt the bail. *Ib.* *On ſurrender, bail-piece to be marked.*

Every bail taken by commiſſioners within 40 miles of *London* or *Weſtminſter*, ſhall be tranſmitted to the chief juſtice, or one of the judges of the court, within eight days after the taking thereof; if above forty miles, within fifteen days, unleſs all the judges be on the circuits, and then as ſoon as any one of them is returned to his chambers. *Mich.* 8 *W.* 3. And there muſt be an affidavit of the due taking the bail, in the following or like form. *In what time bail before a commiſſioner to be tranſmitted.*

In the *King's Bench.* *C. D.* againſt *A. B.*

E. F. of in the county of Gent. maketh oath, that the recognizance of bail hereunto annexed was duly acknowledged by the ſaid *G. H.* and *J. K.* in this deponent's preſence, before *L. M.* Eſq; the commiſſioner who took the ſame. *Affidavit of the due taking of bail.*

Sworn, &c. *E. F.*

If

Proceſs in one county, declaration in another, bail not diſcharged if by bill; aliter *if by original.*

If the defendant be arreſted by proceſs directed to the ſheriff of one county, and bail is put in thereon, and afterwards the plaintiff lays his action in another county, yet the bail, if the action be by bill, are not diſcharged; otherwiſe if by original.

Bail before continuance-day to be filed of preceding term, after continuance-day of the ſubſequent term.

Every bail taken before or upon the continuance-day, is a bail, and to be filed of the preceding term; and every bail taken after the continuance day, is a bail, and to be filed of the ſubſequent term, and not otherwiſe; but where new bail is added to other bail, taken on or before the continuance-day, in ſuch caſe the new bail ſhall be taken and filed as of that term in which the bail was firſt put in.

Bail to be juſtified in court.

Bail cannot be juſtified before a judge at his chambers, except by conſent, but muſt be juſtified in court upon notice given thereof, and affidavit made of ſuch notice.

In the country by affidavit.

Bail taken before a commiſſioner in the country may be juſtified without their perſonal appearance in court, by affidavit of their ability, and of their being houſekeepers.

Bail accepted to be filed in 20 days.

Every bail put in before a judge of the court, which is accepted by the plaintiff ought to be filed within 20 days after it is ſo accepted, by the attorney who put it in. *Trin.* 13 *Car.* 2.

Of bail when defendant arreſted by a wrong name.

If the defendant is arreſted by a wrong name, and puts in bail, he need not join in the recognizance, and then he is not eſtopped to plead it. *Salk.* 3, 8. 1 *R. Raym.* 249. 1 *Vent.* 154.

Bail

Bail cannot be excepted againſt after the plaintiff has declared, unleſs the declaration was delivered *de bene eſſe*; for by declaring he has admitted the bail to be ſufficient. *No exception to bail after declaration delivered.*

Where an exception is entered againſt bail in term-time, and notice in writing is given of it to the defendant's attorney, the defendant ſhall procure his ſaid bail to juſtify, or ſhall add others who ſhall juſtify within * four days *excluſive*, next after ſuch notice; but if ſuch exception be entered in the vacation, and the like notice be given of it, the bail firſt put in, or other additional bail, ſhall juſtify on the firſt day of the following term. *Eaſter term* 5 *Geo.* 2. *Bail in term to be perfected in 4 days after exception.* *In vacation on firſt day of ſubſequent term.*

Exception to bail by original to be entered in the filacer's book, as exception to bail by bill is to be entered in the judge's book, and like notice to be given of it to the defendant's attorney. *Exception to bail by original to be entered in filacer's book.*

If the plaintiff is diſſatisfied with the bail taken by the ſheriff upon the arreſt, and the ſame perſons become bail above, the plaintiff is not bound to accept them, but may enter an exception, and ſerve the ſheriff with a rule to return the writ within ſix days next after notice; and upon the ſheriff's returning the writ, the plaintiff may ſerve him with the like rule to bring in the body of the defendant; and if the ſheriff neglect to return the writ, *Rule for ſheriff to return the writ.* *To bring in the body.*

* In a country cauſe it is often impoſſible to juſtify, &c. within the four days, and therefore it is uſual to ſend up an affidavit of juſtification along with the bail-piece; but if that be not done, application muſt be made for time to juſtify, &c.

And in default an attachment.

writ, or bring in the body within the time preſcribed by the rule, the court will grant an attachment againſt him. *Mich.* 6 *Geo.* 2.

Explanation of the rule.

It is preſumed it is not intended by the rule for bringing in the body of the defendant, that the ſheriff ſhall in all caſes actually bring the defendant into court; for where the plaintiff has taken a bail-bond, and the defendant is at large, and the return of the writ is paſt before the ſheriff is ſerved with the rule, the ſheriff has no power to retake the defendant, and cannot comply with the letter of the rule; but the deſign of it is, that good bail be put in; and if that be done, the ſheriff will be in no danger of an attachment.

If plaintiff takes an aſſignment of the bail-bond, and the ſame perſons become bail above, he cannot except againſt them.

If the plaintiff takes an aſſignment of the bail-bond, and the ſame perſons who are bail to the ſheriff, thereupon become bail to the action, the plaintiff is not at liberty to except againſt them.

Bail not liable to greater ſum than ſworn to, and indorſed on writ.

Salk. 102.
6 Mod. 90, 266, 267.
Holt 89.
3 Keb. 16.
2 Show. 183.
2 Str. 922.

No perſon being bail in a court, or before a judge, ſhall upon a recovery againſt the defendant be anſwerable for any greater ſum or ſums than are ſworn to, or indorſed on the writ or proceſs, on which the defendant was arreſted, (although one part of the condition of the recognizance is to pay the whole condemnation money if the defendant does not); and if a greater ſum be recovered he ſhall not be diſcharged, but ſhall be liable for ſuch ſum or ſums as ſhall be ſo ſworn to or indorſed, or any leſſer ſum that ſhall be recovered againſt the defendant in ſuch action, wherein

wherein he became bail, together with coſts of ſuit. *Eaſter* 5 *Geo.* 2.

One that is bail cannot be a witneſs for the defendant upon the trial, but the court upon motion will diſcharge ſuch bail on putting in another good bail in his ſtead. *Bail cannot be witneſs.*

A bankrupt's bail (which bankrupt obtains his certificate pending the action) diſcharged, if obtained before they are fixed; liable, if not till after. *Bur. Rep.* 244, 245.

An impreſſed man in cuſtody at the *Savoy*, brought up by his bail, in order to be ſurrendered by them in their diſcharge, was firſt committed to the marſhal, with orders to deliver him *inſtanter* to the keeper of the *Savoy*; and an *exoneretur* was entered. *Bur. Rep.* 339, 340.

Of bail-bond.

If bail be not put in, or on exception juſtified in due time, the plaintiff may proceed either againſt the ſheriff by rules and attachment, as before mentioned, or on the bail-bond.

But before the plaintiff takes an aſſignment of the bail-bond, he is to be ſatisfied that the ſureties taken by the ſheriff are able to anſwer the debt; for by accepting the aſſignment he admits the ſufficiency of the ſureties, and therefore he cannot afterwards reſort back to the ſheriff, who was obliged to take a bail-bond; nor can he, if the ſame ſureties become bail to the action, except againſt them; and for the ſame reaſon, if Salk. 99.

the

the ſureties to the ſheriff are put in as bail to the action, and the plaintiff excepts againſt them, his taking an aſſignment of the bail-bond will be a waiver of his exception.

Bail bond aſſignable to the plaintiff.

If any perſon ſhall be arreſted by any proceſs iſſuing out of any of the courts at *Weſtminſter*, at the ſuit of any common perſon, and the ſheriff or other officer taketh bail, the ſheriff, *&c.* at the requeſt and coſt of the plaintiff or his attorney, ſhall aſſign to the plaintiff the bail-bond, by indorſing the ſame and atteſting it under his hand and ſeal in the preſence of two * witneſſes, without ſtamp, provided the aſſignment be ſtamped before action brought thereon. And if the ſecurity be forfeited, the plaintiff after aſſignment may bring an action thereupon in his own name; and the court may by rule give ſuch relief to the plaintiff and defendant in the original action, and to the bail, upon the ſecurity, as is agreeable to juſtice; and ſuch rule of court ſhall have the nature of a defeazance to ſuch bail-bond. *Stat.* 4 & 5 *Ann. c.* 16. §. 20.

Action thereon in his name.

In *Middleſex* you pay 5 *s. viz.* for the aſſignment 2 *s.* 4 *d.* For the plaintiff's diſcharge for the bail-bond 2 *s.* 4 *d.* And for the return of the writ 4 *d.* In other counties they differ, but not much.

You proceed on the bail-bond by ſervice of copies of proceſs, for the defendants are not to be held to ſpecial bail, for that would tend to bail *ad infinitum.*

No

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* See *Forteſc. Rep.* 371.

No bail-bond ſhall be put in ſuit 'till four days excluſive after the return of the writ, if the arreſt be in *London* or *Middleſex*; and 'till ſix days after the return of the writ, if the arreſt be in any other county. *Mich.* 8 *Annæ.* *When Bail-bond may be put in ſuit.*

No action ſhall be brought upon aſſignment of a bail-bond 'till the aſſignment be firſt ſtamped. *No action before aſſignment be ſtamped.*

Every bail-bond ought to be in a penalty double the ſum ſworn to, and indorſed on the proceſs, on which the defendant was arreſted. *Bail-bond to be in double the ſum ſworn to.*

If the bail-bond be put in ſuit, the court on application will ſtay the proceedings upon putting in good bail, paying the coſts, receiving a declaration in the original action, pleading to iſſue, and taking ſhort notice of trial, ſo that the iſſue may be tried the ſame term; but if the plaintiff hath loſt a trial, the court will require further that the bail ſhould conſent to have a judgment entered againſt them upon the bail-bond for the plaintiff's ſecurity: And if the plaintiff might have had judgment againſt the defendant in the original action, in caſe bail had been put in in time, the court in ſuch caſe will not ſtay the proceedings on the bail-bond. *Terms on which the court will ſtay proceedings.*

After bail-bond forfeited, if the court of favour ſtay the proceedings thereupon, the defendant cannot afterwards plead in abatement to the original action, but muſt plead in chief. *Salk.* 519. *No plea in abatement after bail bond forfeited.*

Note; An action lies againſt the ſheriff, if reaſonable bail be tendered and refuſed. 1 *Mod.* 4. *Sheriff muſt take bail.*

Upon

Under ſheriff's clerk cannot aſſign a bail-bond.

Upon a caſe at the aſſizes the queſtion was, whether a bail-bond was well aſſigned by the under ſheriff's clerk. *Parker*, ch. juſt. ſaid, he had had the advice of all his Brothers, and they were of opinion, that an under ſheriff himſelf might aſſign a bail-bond in the name of the high ſheriff, it having been the conſtant practice ever ſince the *ſtat.* 4 & 5 *Annæ.* But that if the aſſignment was neither by the high ſheriff nor his under ſheriff it would not be good; and that being the preſent caſe, the defendant had judgment. *Str.* 60. 10 *Mod.* 288.

If the defendant neglects to put in bail, the bail-bond is forfeited, tho' the plaintiff takes no ſtep to quicken him.

Writ returnable in *Eaſter* term and bail bond taken, no proceedings until 24 *Oct.* when bail-bond aſſigned, and ſpecial bail put in the next day. It was inſiſted, that the plaintiff ought to have delivered a declaration *de bene eſſe*, and thereby quickened the defendant. But the court held, he was not bound ſo to do; and the defendant was in the firſt fault, whereby the plaintiff loſt a trial. So the defendant was forced to conſent, to let the bail-bond ſtand as a ſecurity. 2 *Str.* 1262.

Practice on bail-bonds.

A bail-bond to appear to a writ returnable out of term is void on the face of it. *Str.* 399. *Forteſc. Rep.* 363. Where bail-bonds need not purſue the words of the proceſs. 2 *Str.* 1155. The ſheriff cannot take bail on an attachment. *Str.* 479. *Comyn* 264. *Gilb. Eq. Rep.* 84. The bail to the ſheriff may put in bail above againſt the defendant's will. 2 *Str.* 876. The ſheriff may aſſign the bail-bond out of his county, and the action may be brought where the aſſignment

ſignment is made. 2 *Str.* 727. *L. Raym.* 1455. *Forteſc.* 366. In an action on a bail-bond the arreſt is not traverſable. *Str.* 444, 643.

The declaration on a bail-bond needs not ſet forth, that there was an affidavit of the debt, or that the ſum ſworn to was marked on the back of the writ. *Bur. Rep.* 332.

As to bail on *habeas corpus*, writs of error, *&c.* ſee hereafter under thoſe ſeveral heads. *Declarations.*

When the defendant hath filed his bail, either ſpecial or common, as the caſe required, the next thing the plaintiff has to do is the preparing and delivering his declaration, which is to contain the ſubſtance and matter of his complaint.

——Are held, *&c.* —— to *A. B.* Eſq; ſheriff of the county of —— in, *&c.* —— to be paid to the ſaid ſheriff, or his certain attorney, executors, adminiſtrators or aſſigns, for, *&c.* *Bail-bond to the Sheriff.*

The condition of this obligation is ſuch, that if the above bounden *A. B.* do appear before our ſovereign lord the king at *Weſtminſter*, on —— next after —— (*as in the warrant or writ*) to anſwer to *C D.* of a plea of treſpaſs; and alſo to a bill of the ſaid *C.* againſt the ſaid *A.* to be exhibited according to the cuſtom of the court of the ſaid lord the king, before the king himſelf, for —— *l.* (*or as the caſe is*); then this obligation to be void and of no effect, otherwiſe to remain in full force and virtue.

Precedents of declarations.

Michaelmas *term in the ſeventh year of king* George *the third.*

On a bond.

* *Middleſex, to wit.* ROBERT *Wilſon*, Eſq; complaineth of *Thomas Johnſon*, Eſq; † otherwiſe called *Thomas Johnſon* of *Gray's Inn* in the county of *Middleſex*, Eſq; being in the cuſtody of the marſhal of the *Marſhalſea* of our lord the king, before the king himſelf, of a plea, that he render to the ſaid *Robert* one hundred pounds of lawful money of *Great Britain*, which the ſaid *Thomas* oweth to the ſaid *Robert*, and unjuſtly detaineth from him; for this, to wit, that whereas the ſaid *Thomas* on the ‖ tenth day of *May* in the ſeventh year of the reign of our ſovereign lord *George* the third, now king of *Great Britain*, &c. at the pariſh of St. *Clement Danes* in the county of *Middleſex*, by his certain writing obligatory ſealed with the ſeal of the ſaid *Thomas*, ‡ and to the court of our ſaid

† *As deſcribed in the bond exactly.*

Penalty of the bond.

‖ *The date of the bond.*

Profert.

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* *Obiter:* By the courſe of *C. B.* the county in the margin is part of the declaration, though not held ſo in *B. R. Comyns* 563.

If the defendant is miſnamed in the obligation, as *Edward* for *Edmund*, and ſigns it by his right name, the declaration ſhould be by the name in the obligation. *Dyer* 279. *b.* 9. *Cro. Jac.* 640. 1 *Lutw.* 694, 695. *b.*

‡ The reaſon, wherefore a deed that is pleaded ought to be ſhewed to the court, is becauſe every deed muſt prove itſelf to have ſufficient words in law, whereof the court muſt adjudge; and alſo it is to be proved by others, as by witneſſes or other proof, if the deed be denied, which is matter of fact. 1 *Inſt.* 121. *b.*

ſaid lord the king now here ſhewn, the date whereof is the ſame day and year, acknowledged himſelf to be bound to the ſaid *Robert* in the ſaid one hundred pounds to be paid to the ſaid *Robert* when he the ſaid *Thomas* ſhould be thereunto required; nevertheleſs the ſaid *Thomas*, although often required, *&c.* hath not yet paid the ſaid one hundred pounds to the ſaid *Robert*, but hitherto hath refuſed, and ſtill doth refuſe to pay the ſame to him, to the damage of the ſaid *Robert* of twenty pounds; and thereof he bringeth ſuit, * *&c.*

Robert Richardſon for the plaintiff.
Anthony Beckwith for the defendant.
Pledges of proſecuting { *John Roe*, *Richard Doe.*

Michaelmas *term in the ſeventh year of king* George *the third.*

Middleſex, to wit. *William Dowſe* complains of *William Cave*, otherwiſe called, *&c.* being in the cuſtody of the marſhal of the *Marſhalſea* of our lord the king, before the king himſelf, of a plea that he render to him 100 *l.* of lawful money of *Great Britain*, which the ſaid *William Cave* owes to the ſaid *William Dowſe*, and unjuſtly detains from him, for this, to wit, that whereas the ſaid *On a bill penal.*

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* For variety of precedents and learning on this head, ſee 2 *Mod. Ent.* 177.

William Cave on the twentieth day of *January* in the ſixth year of the reign of our ſovereign lord *George* the third, now king of *Great Britain*, &c. at the pariſh of St. *Clement Danes* in the county of *Middleſex*, by his bill obligatory, ſealed with the ſeal of the ſaid *William Cave*, and to the court of our ſaid lord the king now here ſhewn, the date whereof is on the ſame day and year, acknowledged himſelf to be indebted to the ſaid *William Dowſe* in fifty pounds to be paid to the ſaid *William Dowſe* upon the firſt day of *May* then next enſuing after the date of the ſaid bill; and to the ſaid payment well and truly to be made, the ſaid *William Cave* by the ſaid bill firmly bound himſelf, his heirs, executors and adminiſtrators, in the ſaid one hundred pounds; and the ſaid *William Dowſe* in fact ſays, that the ſaid *William Cave* did not on the ſaid firſt day of *May* pay to the ſaid *William Dowſe* the ſaid fifty pounds, which upon that day he ought to have paid him according to the form and effect of the ſaid bill; whereby an action has accrued to the ſaid *William Dowſe*, to demand and have of the ſaid *William Cave* the ſaid one hundred pounds; nevertheleſs the ſaid *William Cave*, although often required, &c. has not yet paid the ſaid one hundred pounds to the ſaid *William Dowſe*, but *ut antea fol.* 131.

On a ſingle bill.

As before to, of a plea that he render to him fifty pounds of lawful money of *Great Britain*, which the ſaid *W. C.* owes to the ſaid *W. D.* and unjuſtly detains from him; for this, to wit, that whereas the ſaid *W. C.*

on the tenth day of *May* in the ſeventh year of the reign of our ſovereign lord *George* the third, now king of *Great Britain*, *&c.* at *Weſtminſter* in the county of *Middleſex*, by his bill obligatory, ſealed with the ſeal of the ſaid *W. C.* and to the court of our ſaid lord the king now here ſhewn, the date whereof is on the ſame day and year, acknowledged himſelf to be indebted to the ſaid *W. D.* in the ſaid fifty pounds, to be paid to the ſaid *W. D.* his executors, adminiſtrators or aſſigns, upon the firſt day of *Auguſt* next enſuing the date of the ſaid bill obligatory; and to the ſaid payment well and truly to be made the ſaid *W. C.* by the ſaid bill firmly bound himſelf, his heirs, executors and adminiſtrators; nevertheleſs *ut antea fol.* 131.

As before to, of a plea that he render to him five hundred pounds of lawful money of *Great Britain*, which the ſaid *W. C.* owes to the ſaid *W. D.* and unjuſtly detains from him; for that, to wit, that whereas the ſaid *W. C.* on the twenty-firſt day of *April* in the ſeventh year of the reign of our ſovereign lord *George* the third, now king of *Great Britain*, *&c.* at *Weſtminſter* in the county of *Middleſex*; borrowed of the ſaid *W. D.* the aforeſaid five hundred pounds to be paid to the ſaid *W. D.* when he ſhould be thereunto required; nevertheleſs, *ut antea fol.* 131. *On a* mutuatus.

Michaelmas *term in the ſeventh year of king* George *the third.*

On an inland bill of exchange by the indorſee of an indorſee againſt the drawer.
Lill. Entries 44.
Mod. Ent. 95.

Middleſex, to wit. *John Morton* complains of *John Sleddal*, being in the cuſtody of the marſhal of the *Marſhalſea* of our lord the king, before the king himſelf, for this, to wit, That whereas the ſaid *John Sleddal*, on the thirteenth day of *April* in the year of our lord one thouſand ſeven hundred and ſixty-ſeven at *Weſtminſter*, in the county of *Middleſex*, (then being a perſon uſing commerce, to wit, at *Weſtminſter* aforeſaid) according to the uſage and cuſtom of merchants made his bill of exchange in writing ſubſcribed with his hand, bearing date the ſame day and year, and directed the ſaid bill of exchange to one *Kingſmil Eyre*; by the which ſaid bill of exchange the ſaid *John Sleddal* required the ſaid *Kingſmil Eyre* to pay to one *Thomas Pipon*, or his order, the ſum of twenty pounds, *twenty days after* ſight of the ſaid bill, *for value received*, and to place the ſame to the account of ſubſiſtence, for the uſe of Captain *Spicer*'s company of invalids in garriſon at *Jerſey*, and the ſame ſhould be allowed in account by the ſaid *John Sleddal*; and the ſaid *Thomas Pipon* afterwards, to wit, on the fourteenth day of *May* in the year of our lord aforeſaid, at *Weſtminſter* aforeſaid, by his indorſement made upon the ſaid bill, according to the uſage and cuſtom of merchants, ordered the contents of the ſaid bill, to wit, the ſaid twenty pounds, to

Bill of exchange.

Indorſement.

to be paid to one *John Vowler*, * or his order: Which ſaid *John Vowler* afterwards, to wit, on the twenty-ſeventh day of *May* in the year aforeſaid, at *Weſtminſter* aforeſaid, by his indorſement made upon the ſaid bill of exchange, according to the uſage and cuſtom of merchants, ordered the contents of the ſaid bill, to wit, the ſaid twenty pounds, to be paid to the ſaid *John Morton*, or his order; and the ſaid *John Morton* in fact ſays, that he afterwards, to wit, on the firſt day of *June* in the year aforeſaid, at *Weſtminſter* aforeſaid, ſhewed the ſaid bill, with the ſaid indorſements thereupon made, to the ſaid *Kingſmil Eyre*, and then and there requeſted him to accept the ſaid bill; which ſaid *Kingſmill Eyre* would not accept the ſaid bill, but then and there intirely refuſed to accept the ſaid bill, or ever to pay the ſaid twenty pounds mentioned in the ſaid bill; of which premiſſes the ſaid *John Sleddal* afterwards, to wit, on the eighth day of *June* in the year aforeſaid, at *Weſtminſter* aforeſaid, had notice; by

2 *indorſement.*

Drawee refuſes to accept.

* The plaintiff declared upon an indorſement made to *Louiſa Acheſon*, or order; upon producing the bill in evidence, the indorſement appeared to be in theſe words, "Pay the contents to *Louiſa Acheſon*;" therefore it was objected, that the indorſement not being to order did not agree with the declaration. But (a caſe being made) the whole court were of opinion, it was well enough, that being the legal import of the indorſement, and that the plaintiff might upon this have indorſed it over to another, who would have been the proper order of the firſt indorſer. *Judicium pro querente. Acheſon* v. *Fountaine*, *Trin.* 9 *Geo.* *Strange* 557.

reaſon of which ſaid premiſſes, he the ſaid *John Sleddal*, according to the uſage and cuſtom of merchants, became liable to pay to the ſaid *John Morton* the ſaid twenty pounds in the ſaid bill mentioned; and the ſaid *John Sleddal* being ſo liable, afterwards, to wit, on the ſame day and year, at *Weſtminſter* aforeſaid, * in conſideration thereof, undertook, and then and there faithfully promiſed the ſaid *John Morton*, that he the ſaid *John Sleddal* would well and truly pay the ſaid twenty pounds to the ſaid *John Morton*; and alſo whereas the ſaid *John Sleddal*, on the 30th day of *Auguſt* in the year aforeſaid, at *Weſtminſter* aforeſaid, was indebted to the ſaid *John Morton* in eighty pounds, for money before that time received by the ſaid *John Sleddal* to the uſe of the ſaid *John Morton*, and being ſo indebted, the ſaid *John Sleddal*, afterwards, that is to ſay, on the ſame day and year, at *Weſtminſter* aforeſaid, in conſideration thereof, undertook, and then and there faithfully promiſed the ſaid *John Morton*, that he the ſaid *John Sleddal* would well and truly pay the ſaid eighty pounds to the ſaid *John Morton*; nevertheleſs the ſaid *John Sleddal* not regarding his ſaid ſeveral promiſes and undertakings ſo made as aforeſaid, but contriving and fraudulently intending to deceive

Aſſumpſit.

Indeb. aſſum. *for money received to the plaintiff's uſe.*

Breach.

* In *Caſe ſur aſſumpſit* upon a contract, the words *in conſideration thereof* were omitted, but held well enough, there being a conſideration apparent in itſelf, the contract being for goods ſold. 1 *Lutw.* 237.

ceive and defraud the ſaid *John Morton* in this behalf, hath not paid to him the ſaid ſeveral ſums of money, or any of them or any part thereof; although to pay the ſame to him the ſaid *John Morton*, he the ſaid *John Sleddal* afterwards, that is to ſay, on the ſame day and year aforeſaid, at *Weſtminſter* aforeſaid, was requeſted by the ſaid *John Morton*, but the ſaid *John Sleddal* to pay the ſame to him hath hitherto altogether refuſed, and doth yet refuſe, to the damage of the ſaid *John Morton* of eighty pounds; and thereof he brings ſuit, *&c.*

John Lounds for the plaintiff.
Richard Goſwell for the defendant.
Pledges of proſecuting, { *John Doe*, *Richard Roe.*

Trinity *term in the ſeventh year of king* George *the third.*

London, *to wit*, *Thomas W.* complains of *Hugh H.* being in the cuſtody of the marſhal of the *Marſhalſea* of our lord the king, before the king himſelf; for that whereas the ſaid *Hugh H.* on the twelfth day of *June* in the ſeventh year of the reign of our ſovereign lord *George* the third, now king of *Great Britain*, *&c.* at *London* aforeſaid, to wit, in the pariſh of St. *Mary le Bow* in the ward of *Cheap*, made a certain note in writing, ſubſcribed with his own hand, commonly called

On a promiſſory note. Mod. Ent. 91.

a *

a * promiſſory note, bearing date the ſame day and year, by which note the ſaid *Hugh H.* promiſed to pay to the ſaid *Thomas W.*† or his order, *one month after* the date of the ſaid note, the ſum of ten pounds ‖ *for value received*

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* Declaration in caſe on a promiſſory note for twenty guineas, not alledging the value of them. Demurrer. *Per cur.* The action is brought for damages, and the value of the guineas may be given in evidence: In debt for ſo many guineas, the value muſt be ſet forth, ſo as to aſcertain the debt; judgment for the plaintiff. *Mich.* 4 *W. & M. B. R. Fontzel* v. *Burrowes*, *Carth.* 255; *et vide Carth.* 322.

Caſe *ſur aſſump.* on a promiſſory note againſt the indorſer. On trial before *Willes* c. j. at *Guildhall*, it was doubted whether the plaintiff ought not to prove a demand of the drawer before the action brought; the matter on proof was left to the jury, whether a demand was made or not. On motion for a new trial, *Forteſcue* j. mentioned the caſe of *Davis* and *Maſon*, 1 *Geo.* 2. *C. B.* wherein it was agreed by the court, that there ought to be a demand of the drawer, for the indorſer undertook conditionally only, if the drawer did not pay. Indeed if a note be forged, *Holt* c. j. held the indorſer liable tho' no demand; and indeed no demand can be, for when a note is forged there is no drawer. So on a note payable to a man or bearer, no demand need be from him to whom it is made payable. But a new trial was denied, for the evidence of the demand was left to the jury, who were the proper judges of that fact, and knew beſt the courſe of dealing. *Trin.* 11 *Geo.* 2. *C. B. Pardo* v. *Fuller*, *Comyns* 579. *vide* 2 *Vol.* 73.

† *Per Curiam:* A note to pay to *A.* for value received, is within the ſtatute, tho' without the word *order*: *Sel. Caſ. Evid.* 18.

‖ Value received or not is not material, for an action upon a promiſſory note payable to a man or order, tho' it be not for value received, is maintainable upon the *ſtat.* 3 & 4 *Annæ*, *c.* 9. And if value received is in the note, there is no occaſion to prove that the value was paid. 2 *R. Raym.* 1556.

received, by him the ſaid *Hugh H.* by reaſon whereof, and alſo by force of the ſtatute in that caſe made and provided, the ſaid *Hugh H.* became liable to pay to the ſaid *Thomas W.* the ſaid ſum of ten pounds in the ſaid note mentioned, according to the tenor and effect of the ſaid note; and being ſo liable, the ſaid *Hugh H.* in conſideration thereof, afterwards, to wit, the ſame day and year, at *London* aforeſaid, in the pariſh and ward aforeſaid, undertook, and then and there faithfully promiſed the ſaid *Thomas W.* that he the ſaid *Hugh H.* would well and truly pay to the ſaid *Thomas W.* the ſaid ten pounds in the ſaid note mentioned, according to the tenor and effect of the ſaid note: *And whereas* one *Thomas Dawſon*, on the ſixth day of *July* in the ſeventh year of the reign of our ſovereign lord *George* the third, now king of *Great Britain, &c.* at *London* aforeſaid, in the pariſh and ward aforeſaid, made his certain note in writing, called a promiſſory note, ſubſcribed with his proper hand, bearing date the ſame day and year laſt aboveſaid, and by the ſame note promiſed to pay to the ſaid *Hugh H.* or order, *two months after* date of the ſame note, thirty pounds *for value received*; And whereas alſo the ſaid *Hugh H.* afterwards, to wit, the ſame day and year laſt aforeſaid, at *London* aforeſaid, in the pariſh and ward aforeſaid, (the ſaid thirty pounds in the ſaid laſt mentioned note contained, or any part thereof, being no ways paid) by his certain indorſement, with his proper hand ſubſcribed on the ſame note, ordered the ſaid *Thomas Dawſon*

St. 3 & 4 Anne. c. 9.

On an indorſed note by the indorſee againſt the indorſer.

2 Attor. Prac. C. B. 105, 106.

Indorſement.

Dawſon to pay to the ſaid *Thomas W.* the ſaid thirty pounds in the ſaid laſt mentioned note contained, of which ſaid indorſement he the ſaid *Thomas W.* afterwards, to wit, on the ninth day of *September* in the year aforeſaid, at *London* aforeſaid, in the pariſh and ward aforeſaid *, gave notice to the ſaid *Thomas Dawſon*, and then and there requeſted him to pay to the ſaid *Thomas W.* the ſaid thirty pounds in the ſaid laſt mentioned note contained, according to the tenor of the ſame note, which the ſaid *Thomas Dawſon* then and there refuſed to do; whereof the ſaid *Hugh H.* afterwards, to wit, the ſame day and year laſt aforeſaid, at *London* aforeſaid, in the pariſh and ward aforeſaid, had notice, by reaſon of which premiſſes, and by force of the ſtatute in that caſe lately made and provided, the ſaid *Hugh H.* became liable to pay to the ſaid *Thomas W.* the ſaid thirty pounds in the ſaid laſt mentioned note contained; and being ſo liable, the ſaid *Hugh H.* in conſideration thereof, afterwards, to wit, the ſame day and year laſt aforeſaid, at *London* aforeſaid, in the pariſh and ward aforeſaid, undertook, and then and there faithfully promiſed to the ſaid *Thomas W.* that he the ſaid *Hugh H.* would, when he ſhould be thereunto afterwards required,

* The third indorſee of a promiſſory note, kept it from the firſt of *November* to the ſeventh of *January*, without receiving it of the drawer of the note; and in an action againſt the firſt indorſee, without notice, the plaintiff was nonſuited for his neglect. *Trin.* 12 *Geo.* at *Guildhall* before *Raymond* c. j. *Popys* againſt Sir *John Lambert.*

quired, well and faithfully pay the ſaid thirty pounds to the ſaid *Thomas W.* *And alſo whereas* the ſaid *Hugh H.* afterwards, to wit, on the ninth day of *September* in the twelfth year of the reign of our ſoverign lord *George* the ſecond, now king of *Great Britain*, &c. at *London* aforeſaid, to wit, in the pariſh of St. *Mary le Bow*, in the ward of *Cheap*, was indebted to the ſaid *Thomas W.* in the ſum of forty pounds of lawful money of *Great Britain*, for the like ſum of money by the ſaid *Thomas W.* at the ſpecial inſtance and requeſt of the ſaid *Hugh H.* before that time to the ſaid *Hugh H.* lent and advanced; and being ſo indebted, the ſaid *Hugh H.* in conſideration * thereof afterwards, to wit, on the ſame day and year laſt aforeſaid, at *London* aforeſaid, in the pariſh and ward aforeſaid, undertook, and then and there faithfully promiſed the ſaid *Thomas W.* to pay him the ſaid forty pounds when he ſhould be thereunto required: *Neverthelefs* the ſaid *Hugh H. ut antea, fol.* 131.

Ind. aſſ. *for money lent.*

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* Where the law creates a promiſe, the omiſſion of *inde* hurts not; *aliter* in a collateral matter. *Barret* v. *Morley*, *Paſch.* 22 *Car.* 2. *ac vide antea.*

Trinity

Trinity *term in the ſeventh year of the reign of king* George *the third.*

London, to wit. *James Jones* complains of *William Williams*, being in the cuſtody of the marſhal of the *Marſhalſea* of the lord the king before the king himſelf, for that (*to wit*) That whereas the ſaid *William* on the ſecond day of *May* in the year of our lord one thouſand ſeven hundred and ſixty-ſeven, at *London* aforeſaid (*to wit*) in the pariſh of St. *Mary le Bow* in the ward of *Cheap*, was indebted to the ſaid *James* in the ſum of four hundred pounds of lawful money of *Great Britain*, for divers goods, wares and merchandizes, before that time ſold and delivered by the ſaid *James* to the ſaid *William*, at the ſpecial inſtance and requeſt of him the ſaid *William*, and he the ſaid *William* being ſo indebted, in conſideration thereof afterwards, (that is to ſay) on the ſame day, and in the ſame year, at *London* aforeſaid, in the pariſh and ward aforeſaid, undertook and then and there faithfully promiſed the ſaid *James*, that he the ſaid *William* would well and truly pay and ſatisfy unto the ſaid *James* the ſaid ſum of four hundred pounds, when he the ſaid *William* ſhould afterwards be thereunto requeſted. *And whereas alſo* the ſaid *William** afterwards, that

Indeb. aſſ. *for goods ſold and delivered.*

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* In conderation that *Q.* had ſold a mare to *D.* he promiſed to pay *Q. tantum, &c. quantum equa habere meruit*; averment *quod equa habere meruit* 81. Abſurd. Judgment reverſed on error. *Mich.* 4 *W. & M. B. R. Blackman* v. *Cobbet, Carth.* 254.

that is to ſay, on the third day of *May* in the ſaid year of our lord one thouſand ſeven hundred and ſixty-ſeven, at *London* aforeſaid, in the pariſh and ward aforeſaid, in conſideration that the ſaid *James* had before that time ſold and delivered to him the ſaid *William*, at the like ſpecial inſtance and requeſt of him the ſaid *William*, divers other goods, wares, and merchandizes *, undertook, and then and there faithfully promiſed the ſaid *James*, that he the ſaid *William* would well and truly pay and ſatisfy unto the ſaid *James*, ſo much money as the ſaid laſt-mentioned goods, wares and merchandizes, ſo as aforeſaid ſold and delivered, were reaſonably worth at the time of the ſale and delivery thereof, when he the ſaid *William* ſhould afterwards be thereunto requeſted. And the ſaid *James* avers, that the ſaid laſt-mentioned goods, wares and merchandizes, ſo aforeſaid ſold and delivered, were reaſonably worth, at the time of the ſale and delivery thereof, other four hundred pounds of like lawful money, that is to ſay, at *London* aforeſaid, in the pariſh and ward aforeſaid, whereof the ſaid *William* afterwards, that is to ſay, on the ſame day, and in the ſame year, laſt above-mentioned,

Quantum val. thereon.

* *Indeb. aſſ. & quant. meruit*, no nominative caſe to the *aſſumpſit & promiſit in the quant. meruit.* Error brought. *Cur.* Since it is poſitively affirmed at firſt, that the defendant *ſup. ſe aſſumpſit*, that nominative caſe, *viz. defendens*, ſhall go to the ſubſequent verbs. *Trin.* 8 *W.* 3. *B. R. Row* v. *Gatehouſe, Carth.* 379. *vide* 1 *Lutw.* 237.

mentioned, there had notice from the ſaid *James*. *And whereas alſo* the ſaid *William* afterwards, that is to ſay, on the fourth day of *May* in the ſaid year of our lord one thouſand ſeven hundred and ſixty-ſeven, at *London* aforeſaid, in the pariſh and ward aforeſaid, was indebted to the ſaid *James* in other four hundred pounds of like lawful money, for ſo much money before that time had and received by the ſaid *William*, to and for the uſe of the ſaid *James*, and he the ſaid *William*, being ſo therein indebted, in conſideration thereof afterwards, that is to ſay, on the ſame day, and in the ſame year, laſt above-mentioned, at *London* aforeſaid, in the pariſh and ward aforeſaid, undertook and then and there faithfully promiſed the ſaid *James*, that he the ſaid *William* would well and truly pay and ſatisfy unto the ſaid *James* the ſaid laſt-mentioned ſum of four hundred pounds, when he the ſaid *William* ſhould afterwards be thereunto requeſted. *And whereas alſo* the ſaid *William* afterwards, that is to ſay, on the fifth day of *May* in the ſaid year of our lord one thouſand ſeven hundred and ſixty-ſeven, at *London* aforeſaid, in the pariſh and ward aforeſaid, was indebted to the ſaid *James* in other four hundred pounds of like lawful money, for ſo much money before that time lent and advanced by the ſaid *James* to the ſaid *William*, at the ſpecial inſtance and requeſt of him the ſaid *William*; and he the ſaid *William*, being ſo herein indebted, in conſideration thereof afterwards, that is to ſay, on the ſame day, and in the ſame year, laſt above-mentioned, at *London* aforeſaid in the pariſh

Indeb. aſſ. *for money had and received.*

Indeb. aſſ. *for money lent.*

pariſh and ward aforeſaid, undertook, and then and there faithfully promiſed the ſaid *James*, that he the ſaid *William* would well and truly pay and ſatisfy unto the ſaid *James* the ſaid laſt-mentioned ſum of four hundred pounds, when he the ſaid *William* ſhould afterwards be thereunto requeſted. *And whereas alſo* the ſaid *William* afterwards, that is to ſay, on the ſixth day of *May* in the ſaid year of our lord one thouſand ſeven hundred and ſixty-ſeven, at *London* aforeſaid, in the pariſh and ward aforeſaid, had accounted, together with the ſaid *James*, of and concerning divers other ſums of money before that time due and owing from the ſaid *William* to the ſaid *James*, and then being in arrear and unpaid, and upon that accounting, the ſaid *William* had been then and there found in arrear towards the ſaid *James* in one hundred and twenty-three pounds and five ſhillings of like lawful money, and being ſo found in arrear, he the ſaid *William*, in conſideration thereof afterwards, that is to ſay, on the ſame day, and in the ſame year, laſt above-mentioned, at *London* aforeſaid, in the pariſh and ward aforeſaid, undertook, and then and there faithfully promiſed the ſaid *James*, that he the ſaid *William* would well and truly pay and ſatisfy unto the ſaid *James* the ſaid ſum of one hundred and twenty-three pounds and five ſhillings, when he the ſaid *William* ſhould afterwards be thereunto requeſted. Yet the ſaid *William*, in no wiſe regarding his aforeſaid ſeveral promiſſes and undertakings made in manner aforeſaid, but contriving and fraudulently intending craftily and ſubtilly to deceive

Inſimul computaſſet.

Breach.

ceive and defraud the ſaid *James* in this behalf, hath not as yet paid or in any wiſe ſatisfied the aforeſaid ſeveral ſums of money or any part thereof to the ſaid *James*, (although he the ſaid *William* afterwards (that is to ſay) on the ſeventh day of *May* in the ſaid year of our lord one thouſand ſeven hundred and ſixty-ſeven, and often afterwards at *London* aforeſaid, in the pariſh and ward aforeſaid, was requeſted by the ſaid *James* to pay him the aforeſaid ſeveral ſums of money) but hath hitherto wholly refuſed and ſtill refuſes to pay or in any wiſe ſatisfy the ſame to the ſaid *James*, to the damage of the ſaid *James* of four hundred pounds; and thereof he brings his ſuit, *&c.*

W. M. for the plaintiff.
R. R. for the defendant.

Pledges for proſecuting, { *John Doe*, and *Richard Roe.*

Michaelmas *term in the ſeventh year of king* George *the third.*

Indebitatus aſſumpſit *for work done, and materials found.*

Middleſex, } *Amuel Anderſon* complains of
to wit. } *Thomas Trout*, being in the cuſtody of the marſhal of the *Marſhalſea* of our lord the king, before the king himſelf, for that whereas the ſaid *Thomas Trout*, on the ninth day of *September* in the ſeventh year of the reign of our ſovereign lord *George* the third, now king of *Great Britain*, *&c.* at *Weſtminſter* in the county of *Middleſex*, was indebted to the ſaid *Samuel Anderſon* in twenty pounds of lawful money of *Great Britain*, as

well for * work by the ſaid *Samuel Anderſon* before that time done and performed for the ſaid *Thomas Trout*, at his ſpecial inſtance and requeſt, as for divers materials and neceſſary things uſed in and about the ſaid work, by the ſaid *Samuel Anderſon*, before that time found and provided, at the like ſpecial inſtance and requeſt of the ſaid *Thomas Trout*; and being ſo indebted, he the ſaid *Thomas Trout*, in conſideration thereof, afterwards, to wit, on the ſame day and year at *Weſtminſter* aforeſaid, in the county aforeſaid, undertook, and then and there faithfully promiſed the ſaid *Samuel Anderſon*, that he the ſaid *Thomas Trout* would well and truly pay the ſaid twenty pounds to the ſaid *Samuel Anderſon*, when he the ſaid *Thomas Trout* ſhould be thereunto required: *And whereas* the ſaid *Thomas Trout*, afterwards, to wit, on the ſame day and year at *Weſtminſter* aforeſaid, in the county aforeſaid, in conſideration that the ſaid *Samuel Anderſon* had before that time done and performed other work for the ſaid

Quantum meruit *thereon.*

* *Indeb. aſſ. pro opere & labore* ſufficient, without ſetting forth what ſort or manner of work or labour. *Cur.* The only reaſon why the plaintiff is bound to ſhew wherein the defendant is indebted, is, that it may appear to the court, that 'tis not a debt on record or ſpecialty, but only upon *ſimple contract*, and any general words, by which that may be made to appear, are ſufficient. *Paſch.* 5 *W. & M. B. R. Hibbert* v. *Courthope*, *Carth.* 276. 1 *Mod.* 8.

Note; After work is done upon the foot of a ſpecial agreement, the money to be paid by ſuch agreement may as well be recovered on a general *indebitatus aſſumpſit*, as on a ſpecial count upon the contract.

Thomas Trout, at his like ſpecial inſtance and requeſt, and had found and provided divers other materials and neceſſary things uſed in and about the ſaid laſt mentioned work, undertook, and then and there faithfully promiſed the ſaid *Samuel Anderſon*, that he the ſaid *Thomas Trout* would, when he ſhould be thereunto required, well and truly pay to the ſaid *Samuel Anderſon* ſo much money as he therefore reaſonably deſerved to have; and the ſaid *Samuel Anderſon* in fact ſays, that he did therefore reaſonably deſerve to have of the ſaid *Thomas Trout* other twenty pounds of like lawful money of *Great Britain*, to wit, at *Weſtminſter* aforeſaid in the county aforeſaid, of which the ſaid *Thomas Trout* then and there had notice. *And alſo whereas* the ſaid *Thomas Trout*, afterwards, to wit, the ſame day and year at *Weſtminſter* aforeſaid, in the county aforeſaid, had accounted together with the ſaid *Samuel Anderſon*, touching and concerning divers other ſums of money before that time due from the ſaid *Thomas Trout* to the ſaid *Samuel Anderſon*, and then being in arrear and unpaid; and the ſaid *Thomas Trout*, upon the ſaid account, was then and there found in arrear to the ſaid *Samuel Anderſon* in other twenty pounds of like lawful money of *Great Britain*; and being ſo found in arrear, he the ſaid *Thomas Trout*, in conſideration thereof, afterwards, to wit, on the ſame day and year at *Weſtminſter* aforeſaid, in the county aforeſaid, undertook, and then and there faithfully promiſed the ſaid *Samuel Anderſon*, that he the ſaid *Thomas Trout* would well and truly pay the ſaid laſt mentioned twenty

Inſimul computaſſet.

twenty pounds to the ſaid *Samuel Anderſon* when he the ſaid *Thomas Trout* ſhould be thereunto required: *Neverthelefs* the ſaid *Thomas Trout*, *ut antea*, *fol.* 131. *Breach.*

As before to, Was indebted to the ſaid *A. B.* in thirty pounds of lawful money of *Great Britain*, for ſo much money before that time had and received by the ſaid *C. D.* for the ſaid *A. B.* and to his uſe; and being ſo indebted, *&c.* Indebitatus aſſumpſit *for money had and received to the plaintiff's uſe.*

Was indebted to the ſaid *A. B.* in forty pounds of lawful money of *Great Britain*, for ſo much money by the ſaid *A. B.* before that time laid out and expended for the ſaid *C. D.* at his ſpecial inſtance and requeſt; and being ſo indebted, *&c.* *For money laid out for the defendant.*

Michaelmas *term in the ſeventh year of king* George *the third.*

London, *to wit*, ROBERT *Parry* complains of *Thomas Hunt*, being in the cuſtody of the marſhal of the *Marſhalſea* of our lord the king, before the king himſelf, for that, that whereas the ſaid *Robert Parry*, on the third day of *Auguſt* in the ſeventh year of the reign of our ſovereign lord *George* the third, now king of *Great Britain*, *&c.* at *London* aforeſaid, to wit, in the pariſh of St. *Mary le Bow* in the ward * *Trover.* Carth. 216.

* *Note*; In trover there is no plea, but a releaſe, or not guilty; for every plea in juſtification is but tantamount. *Trin.* 14 *Car.* 1. 1 *Keb.* 305. *per Twiſden*; *ſed vide Brown* v. *Wootton*, *Cro. Jac.* 73. *Yelv.* 67. *Moor* 762. 1 *Danv. Abr.* 722. *p.* 2.

ward of *Cheap*, was poſſeſſed of the goods and chattels following, to wit, of one gold chain, one ſilver cup, and one gold watch, of the value of fifty pounds, as of his own proper goods and chattels; and being ſo thereof poſſeſſed, the ſaid *Robert Parry* afterwards, to wit, on the ſame day and year at *London* aforeſaid, in the pariſh and ward aforeſaid, caſually loſt the ſaid goods and chattels out of his hands and poſſeſſion, which ſaid goods and chattels afterwards, to wit, on the ſame day and year, at *London* aforeſaid, in the pariſh and ward aforeſaid, came by finding to the hands and poſſeſſion of the ſaid *Thomas Hunt*: Nevertheleſs the ſaid *Thomas Hunt*, knowing the ſaid goods and chattels to be the proper goods and chattels of the ſaid *Robert Parry*, and to him the ſaid *Robert Parry* of right to belong and appertain, yet contriving and fraudulently intending craftily and ſubtilly to deceive and defraud the ſaid *Robert Parry* in this particular, hath not (though often required) delivered the ſaid goods and chattels to the ſaid *Robert Parry*, but afterwards, to wit, on the ſixteenth day of *Auguſt* aforeſaid in the year aforeſaid at *London* aforeſaid, in the pariſh and ward aforeſaid, converted and diſpoſed of the ſaid goods and chattels to his own proper uſe, to the damage of the ſaid *Robert Parry* of fifty pounds; and thereupon he brings ſuit, *&c.*

A. B. for the plaintiff.
C. D. for the defendant.

Pledges of proſecuting, { *John Doe*, and *Richard Roe*.

Michaelmas

Michaelmas *term in the ſeventh year of king* George *the third.*

Middleſex, to wit, *Samuel Page* complains of *William Berkin*, being in the cuſtody of the marſhal of the *Marſhalſea* of our lord the king, before the king himſelf, * *for that* the ſaid *William Berkin*, on the tenth day of *October* in the ſeventh year of the reign of our ſovereign lord *George* the third, now king of *Great Britain, &c.* at *Weſtminſter* in the ſaid county of *Middleſex*, with force of arms, to wit, with ſtaves and ſwords, made an aſſault upon the ſaid *Samuel Page*, and beat, wounded and treated him ill, whereby the ſaid *Samuel Page* was in great danger of loſing his life, and then and there did other injuries to the ſaid *Samuel Page*, againſt the peace of the preſent king, to the damage of the ſaid *Samuel Page* of five hundred pounds; and thereof he brings ſuit, *&c.* *Aſſault.*

* Andrews 21, 282.

Anthony Beckwith for the plaintiff.
R. Richardſon for the defendant.
Pledges of proſecuting, *John Doe*, and *Richard Roe.*

Trinity *term in the ſeventh year of the reign of king* George *the third.*

Wilts, to wit. *William N.* Eſq; complains of *Thomas Arlett* the younger, in the cuſtody of the marſhal of the *Marſhalſea* of our lord the king, before the king himſelf, for *Treſpaſs for digging the plaintiff's cloſe, and carrying away his oaker.*

for that the ſaid *Thomas*, on the firſt day of *June* in the year of our lord one thouſand ſeven hundred and ſixty-ſeven, and at divers other days and times between that day and the day of exhibiting this bill, with force and arms, *&c.* broke and entered the cloſe of the ſaid *William* called *the Common*, in the pariſh of *Box* in the ſaid county of *Wilts*, and ſubverted and dug up the ſoil, (to wit) twenty perches of the ſoil of the ſaid *William*, in the ſaid cloſe, and dug up, took, carried away and detained the oaker, (to wit) fifty hundred weight of oaker of the ſaid *William* of the value of thirty pounds, found in the ſaid cloſe, and dug up, took, carried away and detained other oaker, (to wit) fifty hundred weight of other oaker of the ſaid *William* of the value of thirty pounds, found in the ſaid cloſe; and alſo for that the ſaid *Thomas* afterwards, that is to ſay, the ſame day and year aforeſaid, and at divers other days and times between that day and the day of exhibiting this bill, with force and arms, *&c.* broke and entered one other cloſe of the ſaid *William*, in the ſaid pariſh of *Box* in the county aforeſaid, and ſubverted and dug up the ſoil, (to wit) twenty perches of the ſoil of the ſaid *William*, in the ſaid laſt mentioned cloſe, and dug up, took, carried away and detained other oaker, (to wit) forty hundred weight of other oaker of the ſaid *William* of the value of five and twenty pounds, found in the ſaid laſt mentioned cloſe, and did other wrongs to the ſaid *William*, againſt the peace of our lord the king, to the damage of the ſaid

ſaid *William* of ſixty pounds; and thereof he brings ſuit, *&c.*

Pledges of proſecuting, { *John Doe*, and *Richard Roe.*

If the cauſe of action ariſes on ſome day within the term of which the declaration is delivered, the declaration muſt be of ſome day in the term after the cauſe of action accrued, in this manner: Michaelmas *term, to wit, on* Monday *next after the morrow of* All Souls *in the ſeventh year of king* George *the third*; and not of *Michaelmas* term generally. *

Cauſe of action ariſing in the ſame term with declaration, the declaration to be of ſome day ſubſequent.

Battery; iſſue, and verdict for the plaintiff in *Mich.* 8 *W.* 5. Motion in arreſt of judgment for that the declaration is of *Eaſter* term 8 *W.* 3. and the fact laid to be done 1 *Feb.* 8 *W.* 3. a day not yet come (for *W.* 3. began his reign 13 *Feb.*) Anſwered, this is not like the caſe where ſuit commenced before cauſe of action aroſe, here the time laid appears to be impoſſible, and 'tis no more than a declaration without a day, for an impoſſible day is as no day, and would have been bad upon demurrer; but the defect is cured by the verdict; a verdict helps every thing which is neceſſary to be proved at the trial; and unleſs the plaintiff had proved the battery to be done before that time, 'twas impoſſible for

Declaration in aſſault at a day impoſſible, good after verdict.

* The time alledged in a declaration muſt not be ſubſequent to the bringing of the action. *Lucas* 251.

for the jury to find the defendant guilty. *Judic. pro Q. Mich.* 8 *W.* 3. *B. R. Blackal* v. *Eale, Carth.* 390. *Comyns* 12, 13. *Vide* 2 *Saund.* 169. 3 *Keb.* 354.

Declaration in trover of Hil. *term, converſion* 3 Feb. *good, if bail filed after* 3 Feb.

Trover; and verdict *pro Quer.* Motion in arreſt of judgment, that the action was commenced in *Hilary* term, and the converſion alledged to be 3 *Feb.* ſame term, and the bill filed relates to the firſt day of the term, and ſo before the cauſe of action. *Per Cur.* If bail were entered after 3 *Feb.* it's well enough, for it is that which gives the court juriſdiction. 1 *Vent.* 135.

The like caſe.

S. C. Trover. Non cul. Verdict *pro Q.* and motion in arreſt of judgment, that converſion was laid at a day in *Eaſter* term, and *narr.* generally of *Eaſter* term, and not at a day certain, and then muſt relate to the firſt day of term. *Per cur.* 'Tis well if the bail was filed after cauſe of action accrued, for here no action can be depending, or *narr.* delivered 'till the defendant be *in cuſtodia mar.* and that is, never 'till bail filed, which filing is at a certain day. 2 *Lev.* 13.

Declaration in trover of Eaſt. *term, converſion on firſt day of that term, good, bill being filed at a day after the firſt day.*

Trover. Verdict *pro Q.* and motion in arreſt of judgment, that converſion laid 20 *April*, being firſt day of *Eaſter* term, and *narr.* was generally *de termino Paſchæ.* But it appearing the bill was filed, and *narr.* delivered after 20 *April*, *Judic. pro Q.* without amendment; for though *narr.* being general, relates to the firſt day of the term; yet the bill being filed at a day after, all relates to the filing of the bill by the courſe of the court. 2 *Lev.* 176. 2 *Jones* 87. 3 *Keb.* 693.

Memo-

Memorandum of a bill of *Michaelmas* term generally, in an action for a malicious proſecution on a day after that term began, judgment arreſted after verdict for the plaintiff. *Holt* ch. juſt. cited a caſe, *Hutchinſon* and *Thomas*. But it hath been held good, if bail was filed after the term began. *Paſch.* 2 *W. & M. B. R. Venables* v. *Daffe*, *Carth.* 113. *Vide Carth* 172.

The declaration generally of *Michaelmas* term for words ſpoken 5 *November* (*eodem termino*) verdict for plaintiff, and judgment arreſted. 1 *Show.* 147. *Vide Andrews* 250. 2 *Str.* 1271.

Declaration in ſlander of Mich. *term, words ſpoke* 5 Nov. *judgment arreſted.*

If an infant declares by guardian, or *prochein amy*, the defendant is not compellable to plead, until the plaintiff produces a rule of court admitting him to declare by *prochein amy*, or guardian.

Infant cannot declare by prochein amy, *or guardian, without rule of court.*

In the King's Bench.

Between { John Weſt *and* George Weſt the *younger*, *plaintiffs*, John Weſtcombe, *defendant*.

To the right honourable William *Lord* Mansfield, *lord chief juſtice of* England.

The humble petition of *John Weſt* and *George Weſt* the younger, infants, under the age of 21 years, the plaintiffs in this cauſe,

Sheweth THAT your petitioners have, as they are adviſed, good cauſe of action againſt the defendant *John Weſtcombe*, for

Petition to aſſign an infant a guardian.

for entering into and taking the meſne profits of a meſſuage or tenement and garden belonging to your petitioners, the poſſeſſion whereof they have lately recovered againſt him on an ejectment at their demiſe, and that your petitioners have lately brought this action againſt the ſaid *John Weſtcombe* in this honourable court for ſuch entry and taking the ſaid meſne profits; but, in regard to your petitioners infancy,

Your petitioners humbly pray your lordſhip would be pleaſed to aſſign their father *George Weſt* the elder, as and for your petitioners guardian, to proſecute their ſaid ſuit or action againſt the ſaid defendant *J. W.*

And your petitioners ſhall, &c.
J. W.
G. W. Jun.

Guardian's conſent.

I do accept and agree to be guardian to the plaintiffs *John Weſt* and *George Weſt* the younger, infants, according to the prayer of the above petition. Witneſs my hand the 25th day of *January* 1768.

George Weſt.

In the King's Bench.

Between { John Weſt *and* George Weſt *the younger, plaintiffs,* / John Weſtcombe, *defendant.*

Affidavit of the infants and guardian their ſigning the petition and conſent.

William Vernon, of the town and county of *South'ton*, Gentleman, maketh oath, that *John Weſt* and *George Weſt* the younger, infants, the petitioners in the petition hereunto annexed named, on this preſent 25th day of *January* did duly ſign the petition hereunto annexed in this deponent's preſence; and this deponent ſaith, at the ſame time he was preſent, and did ſee *George Weſt* the elder, the perſon mentioned in the ſaid petition, duly ſign the acceptance or agreement there under written, in order to his being a guardian to the ſaid *J. W.* and *G. W.* the younger.

Sworn at, *&c.* *William Vernon.*

Copy of declaration to be delivered to defendant's attorney, who is to pay for the ſame.

Formerly the declaration itſelf uſed to be delivered to the defendant's attorney, to keep 'till he had made a copy of it, and then return it; but inconveniences ariſing, a rule was made *Trin.* 12 *W.* 3. whereby the plaintiff's attorney is only bound to deliver a copy of the declaration to the defendant's attorney, who is to pay for the ſame after the rate of 4 *d. per* ſheet, computing ſeventy-two words to a ſheet, beſides the king's duty.

And

For non-payment to be left in the office, and plaintiff to proceed.

And by the ſame rule, if the defendant's attorney refuſes to pay for the copy of a declaration, the plaintiff's attorney may leave the copy with the clerk of the declarations, who is to receive the ſame without fee or reward; and the plaintiff's attorney having given a rule to plead, and demanded a plea, may ſign judgment for want of a plea, and the plea is not to be received before the copy of the declaration is paid for.

When declaration may be left in the office.

Where ſpecial or common bail ſhall be filed for any defendant, and notice thereof is given, the attorney for the plaintiff ſhall deliver the declaration to the attorney for ſuch defendant, who ſhall pay for the ſame. But if the attorney for the defendant, or his clerks in his abſence, ſhall refuſe to pay for the ſame, or if the place of habitation of ſuch attorney for the defendant ſhall be unknown to the attorney for the plaintiff, then the attorney for the plaintiff may leave the declaration in the office with the clerk of the declarations, but immediately ſhall give notice thereof in writing to the defendant or his attorney; and ſuch declaration ſhall be deemed well delivered only from the time of ſuch notice. *Trin.* 11 *G.* 1. 2 *R. Raym.* 1407. *Note*; *In a manuſcript which I have, and in the printed book of rules, this rule is ſaid to have been made* Trin. 2 Geo. 2. *Ideo Q.*

Notice,

only well delivered from the time of ſuch notice. Poſt 160.

Defendant's attorney to pay plaintiff's attorney 4 d. *for his warrant of attorney, or judgment.*

Upon the delivery of every copy of a declaration, or taking the ſame out of the office, the defendant's attorney ſhall pay to the plaintiff's attorney 4 *d.* for the defendant's warrant of attorney, which warrant of attorney

ney the plaintiff's attorney ſhall file with the proper officer; and upon the defendant's attorney's refuſing to pay the ſaid 4 *d.* for the warrant, judgment may be ſigned. *Mich.* 5 *Annæ.*

Formerly the defendant in all caſes had an imparlance to the term next after the return of the proceſs, except the proceedings were by original, or for or againſt attornies or other privileged perſons, or againſt priſoners in the cuſtody of the marſhal; in which caſes the defendant was bound to plead, without any imparlance, the ſame term the declaration was delivered, (if delivered four days before the end of the term) and except the proceedings were by *habeas corpus*, or the proceſs was returnable the firſt return of *Eaſter* or *Michaelmas* term, and the action laid in *London* or *Middleſex*; in which laſt caſe, if the declaration was delivered before the eſſoin-day of *menſ. Paſ.* or *craſtinum animarum*, the defendant was to plead two days before the eſſoin-day of the ſubſequent term. *Mich.* 5 *Annæ.*

Formerly imparlances in all caſes, except.

But now, by a rule made in *Trinity* term 5 & 6 *Geo.* 2. upon all proceſs to be ſued out of this court, returnable the firſt or ſecond return of any term, if the plaintiff declares in *London* or *Middleſex*, and the defendant lives within twenty miles of *London*, the declaration ſhall be delivered *with notice* to plead within four days after the delivery, and the defendant ſhall plead within the ſaid four days without imparlance; and in caſe the plaintiff declares in any other county, or the defendant lives above twenty miles from

In what caſe defendant to plead in four days.

When in eight days.

from *London*, the declaration ſhall be delivered *with notice* to plead within eight days after the delivery, and the defendant ſhall plead within the ſaid eight days without any imparlance; and in default of pleading in either of theſe caſes, judgment may be entered.

Declaration to be delivered 4 days before the end of the term.

In both theſe caſes the declaration muſt be delivered at leaſt four days before the end of the term, excluſive of the day of the delivery, otherwiſe the defendant will be intitled to an imparlance.

If common bail filed by the plaintiff, declaration to be left in the office, and notice given.

Where a copy of the proceſs is ſerved, and an appearance is entered, or common bail filed for the defendant by the plaintiff's attorney, a copy of the declaration muſt be left in the office of the clerk of the declarations, and notice thereof is to be given to the defendant, by delivering to, or leaving for him at his laſt or moſt uſual place of abode, a note in writing, ſignifying the nature of the action, at whoſe ſuit proſecuted, and the time allowed by the rules of the court for pleading thereto; and that unleſs ſuch defendant plead thereto within ſuch time, judgment will be entered againſt him by default; and from the time only of giving ſuch notice, ſuch declaration ſhall be well delivered; and if the defendant does not plead within ſuch limited time, judgment may be ſigned without further or other calling for a plea, and the plaintiff may thereupon give notice of executing his writ of inquiry, either by delivering a notice in writing to ſuch defendant or defendants, or by leaving the ſame at the laſt

Declaration well delivered from time of notice only. *Ante* 158.

or

or moſt uſual place of abode of ſuch defendant or defendants. *Trin.* 1 *Geo.* 2.

In the King's Bench.

E. P. *widow, executrix of the laſt will and teſtament of* R. P. *deceaſed, plaintiff,*

againſt

A. A. *defendant.*

TAKE notice, that I have this day left in the office of the clerk of the declarations in the *King's Bench* office in the *Inner Temple, London*, a copy of a declaration as of laſt *Trinity* term, againſt you at the ſuit of *E. P.* widow, executrix of the laſt will and teſtament of *R. P.* deceaſed, in an action of treſpaſs on the caſe upon ſeveral promiſes made by you to the ſaid *R. P.* in his life-time, in which ſaid declaration the ſaid plaintiff has laid her damages to twenty pounds, and that unleſs you plead to the ſaid declaration within the firſt four days of next *Michaelmas* term, judgment will be entered againſt you by default.

R. R. attorney for the plaintiff.

19 *October* 1768.

To A. A. *the defendant.*

Mr. *W. S.*

TAKE notice, that a declaration is filed againſt you in the *King's Bench* office in the *Inner Temple, London*, with the clerk of the declarations there conditionally, till com-

Notice of declaration filed de bene eſſe, *till common bail put in.*

mon bail filed in an action of treſpaſs on the caſe on promiſe, at the ſuit of *D. L.* the plaintiff in ſuch action, and unleſs you plead thereto within eight days after ſervice hereof, judgment will be entered againſt you by default. Dated the ſecond day of *June* 1768.

T. N. plaintiff's attorney.

Declaration indorſid.

This declaration is filed conditionally, till common bail filed, and the defendant is to plead hereto in eight days.

In the King's Bench.

Between *J. H.* plaintiff, and *S. P.* defendant.

Mrs. *S. P.*

Notice of declaration filed de bene eſſe, *till ſpecial bail put in.*

TAKE notice, that a copy of a declaration in this cauſe is left conditionally, until bail above be put in and perfected, with the clerk of the declarations in the *King's Bench* office in the *Inner Temple, London,* as of this preſent *Michaelmas* term, againſt you at the ſuit of the above named *J. H.* in an action of treſpaſs on the caſe on ſeveral promiſes, in which ſaid declaration the ſaid plaintiff hath laid his damages to— and unleſs you *put in bail above and* plead to the ſaid declaration within four days after this notice (*a rule to plead being this day given*) Judgment will be entered againſt you by default

default. Dated the ſixth day of *November* 1768.

Clifford's Inn. Your humble ſervants,
No. 13. *C. H.*
W. N. for the plaintiff.

This declaration is filed conditionally, and the defendant is to plead thereto in four days. *Declaration indorſed thus.*

When a defendant has filed ſpecial or common bail, any perſon may deliver or file againſt him a declaration by the * by at any time *Of delivering declarations by the by.*

* A declaration was put into this court againſt one *in cuſtodia mareſcalli*, and afterwards the plaintiff is nonſuit. It was doubted whether the plaintiff may, notwithſtanding he is nonſuit, declare again againſt the priſoner within three terms without arreſting him *de novo*. *Glyn* ch. j. ſaid, that it is not reaſonable he ſhould, for the plaintiff by being nonſuit is out of court, and the defendant alſo; and therefore it ſeems not reaſonable to charge the defendant or his bail upon the former proceedings; yet it was ruled he might. *Q. nota.* But it was ſo ruled, becauſe *Barrel* and *Herne*, clerks of the court, informed the court that it had been heretofore ſo done. *Paſch.* 1656. *B. S. Gardin* and *Frith*, *MS. Styles* 8. *a. b.*

Upon a motion the caſe appeared to be this; The plaintiff brought his action againſt the defendant, and was afterwards nonſuit, and then put in a new declaration againſt the defendant upon the former appearance, and bail given; the defendant moved that this declaration might not be admitted, becauſe by the nonſuit all parties are out of court; but *Glyn* ch. j. ſaid, that he may declare anew upon the ſame bail, if he pleaſe, any time within two terms, if it be upon a *cepi corpus* returned, or within three terms upon a *habeas corpus*; but

time (ſitting the court) during the term wherein the proceſs againſt the defendant was returnable; and I have heard it ſaid, that the plaintiff, at whoſe ſuit the proceſs is, might declare againſt him in as many actions as he thinks fit, before the end of the next term after the return of the proceſs.

How in caſe plaintiff file common bail for the defendant.

2 Str. 1027.

But for ſettling the practice of the court touching declaring by the by in caſes where the plaintiff in any action or ſuit ſhall file common bail for the defendant, purſuant to the late act of parliament for preventing frivolous and vexatious arreſts, it is ordered, that in all ſuch caſes the plaintiff in ſuch action or ſuit, wherein common bail hath been or ſhall be ſo filed as aforeſaid, may deliver a declaration by the by againſt ſuch defendant, in like manner as he might have done by the antient practice of the court; but that no other

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but he muſt alter his declaration, and ſo the clerks of the court affirmed; but *Liveſey*, an attorney of the court, ſtrongly againſt it. *Nota*; the rule was to pay coſts upon the firſt nonſuit, and to declare again. *Trin.* 1656. *B. S. Prowdlove* and *Humphryes*, *MS.* *Styles* 9 *b.*

It being a queſtion, whether when a man is by rule of court made defendant in ejectment, and files common bail, another may put in a declaration upon the by againſt him, as is uſually done when the defendant comes in, and is in cuſtody by proceſs of the court. *Curia:* The defendant coming in only by the rule of court according to the new way of practice, we will not extend the rule to make him compellable to receive a declaration upon the by; and let it be ſo generally obſerved in all caſes of this nature, as well as in this particular caſe. *Mich.* 1658. *B. S.* *Anonymus*. *MS.* *Styles* 47. *b.*

other perſon (except ſuch plaintiff) is or ſhall be capable of delivering a declaration by the by againſt any defendant by reaſon of common bail being ſo filed by any plaintiff as aforeſaid; and for the better diſtinguiſhing by whom common bail ſhall have been filed in any action or ſuit, it is further ordered, that in all caſes where common bail ſhall be filed by the plaintiff for the defendant by virtue of the ſaid act, theſe words ſhall be wrote on the bail-piece, *viz. filed according to the ſtatute*, or words to the like effect. *Mich.* 10 *Geo.* 2.

When common bail filed by plaintiff, bail-piece to be marked.

Upon all proceſs to be iſſued out of this court, returnable the firſt or ſecond return of any term, where no affidavit ſhall be made and filed of the cauſe of action, purſuant to the late act of parliament for preventing frivolous and vexatious arreſts, the plaintiff may deliver the declaration *de bene eſſe*, at the return of ſuch proceſs, with notice to plead within eight days after the delivery thereof; and if the defendant doth not file common bail, and plead within the ſaid eight days, the plaintiff having filed common bail for ſuch defendant, according to the ſaid act, may ſign judgment for want of a plea, a rule to plead having been duly entered; and upon all proceſs to be iſſued, and made returnable as aforeſaid, where an affidavit ſhall be made and filed of the cauſe of action, purſuant to the ſaid act, the declaration may be delivered at the return of ſuch proceſs, with notice to plead in four days after ſuch delivery, if the *action is laid in* London *or* Middleſex, *and the defendant lives within twenty miles of* London,

Of delivering declarations de bene eſſe.

Where no affidavit of debt, declaration to be delivered de bene eſſe *with notice to plead in eight days.*

Where an affidavit in four days, if in London *or* Middleſex, *or defendant lives within twenty miles of* London.

Otherwiſe in eight days.

and in eight days if the action is laid in any other county, *or* the defendant lives above twenty miles from *London*; and if the defendant puts in bail, and does not plead within ſuch time as is reſpectively before mentioned, judgment may be ſigned, a rule to plead having been duly entered. *Mich.* 10 *Geo.* 2.

Suppoſe a latitat to the ſheriff of Surry againſt a defendant living in the borough of Southwark, and the plaintiff declared in Middleſex, as the defendant has ſix days to put in bail, Q. whether 4, 6, *or* 8 *days notice is to be given?*

This was a long litigation concerning the regularity of a judgment, which on the defendant's motion, had been referred to the maſter, who thought it irregular; whereupon the plaintiff appealed to the court, from the maſter's opinion.

The queſtion depended upon the above rule of this court, and upon the practice of the court purſuant to that rule.

The preſent fact was, that the proceſs was returnable on *Saturday* 15th of *November*, (the ſecond return of the term), the declaration, with notice "to plead in 8 days," was left in the office on *Monday* the 24th of *November:* and upon the defendant's not pleading within the 8 days, nor even before the time of ſigning the judgment; the plaintiff on the 3d of *January* (ſix weeks afterwards) filed common bail for the defendant, and (a rule to plead having been duly

duly entred) ſigned judgment upon the ſame day.

The maſter thought this to be irregular; for that when the defendant was once in court, the plaintiff ought to proceed againſt him *as being* in court; by which expreſſion he ſeemed to mean, either that the plaintiff ſhould deliver a declaration *a freſh*; or that he ſhould give a *freſh* rule to plead.

Defendant (in the ſupport of the maſter's opinion) urged that when the 8 days (the time for pleading) are out, the *de bene eſſe* declaration is at an end. And he mentioned a caſe *Llewellin* v. *Skyrm*, as in point.

But plaintiff denied this; and ſaid that the 8 days were *not* out; but the declaration *de bene eſſe* was delivered *within time*, (though not indeed till the 9th day;) becauſe there were *two Sundays* included, viz. 16th and 23d of *November* and that the plaintiff might have ſigned this judgment on *Tueſday* the 25th.

The maſter was at firſt, inclined to think that the *Sunday* was no excuſe, and that this was not a ſufficient reaſon to allow the plaintiff time till the 9th day, for delivering the declaration *de bene eſſe*. But all the officers thought otherwiſe; and the court ſeemed to think ſo too; whereupon the maſter ſeemed to give that point up.

The court were of opinion that the judgment was regular.

Lord *Mansfield* was clear, that no *further* notice (beſides that given on delivering the declaration *de bene eſſe*) was neceſſary.

Mr. juſtice *Deniſon* ſaid the defendant had 8 days *after the delivery* of the declaration *de*

bene esse, *whenever* it may be delivered, (either sooner or later); and this was *left in the office*, (which he held to be a good delivery,) on the 24th, which was *within time*; and the defendant did *not* plead within 8 days; whereupon the plaintiff files common bail for him, upon the 3d of *January*; and signs judgment the *same* day, which is regular; for the *rule is complied with*, and the defendant is not at all hurt; on the contrary, he has had *longer* time than he was intitled to.

Mr. justice *Foster*: The whole objection is "That the plaintiff has not proceeded with so much speed as he *might* have done:" for he *might* have signed his judgment on the 25th of *November*, the defendant might have filed common bail for *himself*, if he had thought proper: and then he might have had a fresh rule to plead.

By the court unanimously, the rule of reference to the master, for irregularity in this judgment, was discharged. *Bur. Rep.* 56, 57.

Where an executor's time for pleading was out, the court would not inlarge his time for pleading, unless he would enter into a rule not to plead any judgment obtained against him after his time was out. *Mod. Ca.* 308; *et vide Bulst.* 122, 123.

Delivering a declaration, unless de bene esse, *before bail is put in, is a waiver of the bail.*

In an action requiring bail, the delivering a declaration before bail is put in, is a waiver of the bail; and if before the bail be justified, it is an acceptance of them; but if delivered *de bene esse*, then it is only conditionally until good bail be put in, or the bail already put in do justify.

If

If proceſs iſſue out of this court returnable at a day certain, and the defendant doth by his attorney appear, and file bail of the term wherein the proceſs is returnable, and the plaintiff doth not declare before the end of the term next following, a non-proſs may be ſigned without entering any rule to declare, or calling for a declaration, and the defendant ſhall have coſts taxed as uſual. *Stat.* 13 *Car.* 2. *ſtat.* 2. *c.* 2. §. 3.

Plaintiff to declare before the end of the ſecond term, or non-proſs'd. 12 Mod. 526.

And if the declaration ſhould be tendered at any time after the end of the ſecond term, and before the non-proſs is ſigned, the plaintiff is not bound to accept the declaration, but may ſign his non-proſs at any time after the end of the ſecond term.

Non-proſs may be ſigned although declaration tendered. 12 Mod. 217.

In caſe the proceeding be by original, the practice in this court is the ſame with the *Common Pleas*; the defendant muſt before the end of the ſecond term, or within four days after, enter a rule for the plaintiff to declare, and demand a declaration in writing; and if the plaintiff don't declare before the rule is out, the defendant may, at any time before the eſſoin-day of the next term, ſign a non-proſs, but not afterwards.

Signing non-proſs when by original.

A *latitat* was awarded againſt four defendants, the plaintiff was nonſuited by every one of them ſeverally for not declaring againſt them in two terms, and 30*s.* coſts awarded to every one of the four defendants; but it was held ill; for by *Holt* ch. j. though the plaintiff might declare againſt them ſeverally, yet as the writ was awarded againſt them jointly, and the plaintiff was nonſuited before any declaration, there ought to be but one

But one nonſuit though there be ſeveral defendants in the writ.

one nonſuit for all of them. *Trin.* 12 *W.* 3. *B. R. Anonymus, Comyns* 74.

Time to declare on eſcape warrant.

If any perſon in cuſtody of the marſhal of this court, upon meſne proceſs ſhall make his eſcape, and be taken and detained in cuſtody of any ſheriff by virtue of an eſcape warrant, unleſs the plaintiff in ſuch action do declare againſt him in cuſtody of the ſheriff before the end of the ſecond term next after his being taken on the eſcape warrant, ſuch perſon may be diſcharged by *ſuperſedeas*. *Trin.* 6 *Annæ.*

When plaintiff may amend in matter of form without paying coſts or giving imparlance.

The plaintiff may amend his declaration after a general iſſue pleaded, and before entry in matter of form, without paying coſts or giving an imparlance; but if in ſubſtance, he muſt pay his coſts, or give an imparlance, at his election. *Vide Fitz-Gibbon* 193. 2 *Stra.* 890. *Barnard. K. B.* 408.

If in ſubſtance after ſpecial plea, muſt pay coſts.

If the amendment be in ſubſtance after a ſpecial plea pleaded, the plaintiff muſt pay coſts, though he had rather give an imparlance.

On amendment, defendant to plead de novo, *and in what time.*

In caſes of amendment after plea pleaded, the defendant has liberty to plead again, and has two days for that purpoſe after the amendment made, and payment of coſts.

If rule before in ſame term, no new rule.

If a rule to plead be entered the ſame term the amendment is made, though before ſuch amendment, it is ſufficient, otherwiſe a new rule to plead muſt be entered.

Bill on the file may be amended before plea.

The plaintiff may amend his bill upon the file at any time before plea pleaded, during the term of which it is filed, but not afterwards without leave of the court.

The

The plaintiff after plea pleaded, or after the end of the ſecond term, ſhall not add a new count to his declaration (as an *indebitatus aſſumpſit*, or the like) under pretence of amending his declaration. *New count not to be added after plea or ſecond term.*

If the plaintiff ſees occaſion, he may diſcontinue either before or after declaration delivered, by motion at the ſide-bar, on payment of coſts.* *Plaintiff may diſcontinue.*

Of changing the venue.

IN tranſitory actions the plaintiff, after the eſſoin-day of the ſubſequent term after the appearance, ſhall not alter his own *venue*, though he would pay coſts or give an imparlance. See *Str.* 211. 2 *Str.* 858. *Plaintiff can't alter* venue *after eſſoin-day of ſecond term.*

If the defendant at any time before plea pleaded (*Mich.* 1654. *Salk.* 668, 669. *Mod.* 2.) makes affidavit, that the cauſe of action *Defendant may have* venue *changed before plea on affidavit.*

* After iſſue joined on demurrer refuſed, and ſaid it muſt be moved in court. *Trin.* 1753. *Saxby* againſt *Kirkus.*

The plaintiff in *Trin.* 1753. had demurred to the defendant's plea, after argument this term the court refuſed to let the plaintiff withdraw his demurrer, but gave leave to diſcontinue on payment of coſts. *Hil.* 1754. *Saxby* againſt *Kirkus.* *Mes vide T. Raym.* 449. *T. Jones* 158. The plaintiff in *Trin.* 1753. had demurred to the defendant's plea, who had joined in demurrer, but the cauſe had not been ſet down for argument. Leave given to withdraw the demurrer on payment of coſts. *Hil.* 1754. *Kirkus* againſt *Brooks.*

2 Str. 1162, 1202.

action (if any) aroſe in the county of *A.* and not in the county of *B.* where the action is laid, or elſewhere out of the county of *A.* the court will change the *venue* into the county of *A.* But if the plaintiff will undertake to give evidence of ſome matter in iſſue ariſing in *B.* the action ſhall be there continued. *Salk.* 669.——But ſuch evidence muſt be material and of the matter in iſſue; as where in trover and converſion the defendant had leave to change the *venue*, the plaintiff moved to ſet the rule aſide, offering to be bound to give evidence in the county where the action was firſt laid. On inquiry the court found the plaintiff was an aſſignee of commiſſioners of bankrupt, and would prove the aſſignment in that county. *Per cur'*: The converſion is the cauſe of action, and not the aſſignment; you are in the place of the commiſſioners, and the *venue* was according to the rule. *Ib.* Where a rule is made to change a *venue*, and afterwards the plaintiff would bring it back, the rule muſt be *dare aliquam evidentiam de materia in exitu* in the county where the action is brought. *Ibid.* And if the plaintiff will be bound to give ſome material evidence of the matter in iſſue in the county where the action is laid, the court will not change the *venue*. Where evidence neceſſary to ſupport the action ariſes in two counties, the plaintiff may lay the *venue* in which county he will. *Ibid.*

How reſtrained.

Where evidence ariſes in two counties, the plaintiff may chuſe which he will.

Not changeable in ſcandalum magnatum.

The *venue* is not changeable in *ſcandalum magnatum.* Lev. 56. Vent. 363, 364. 365. 2 Mod. 215. 2 Jones 192. Carth. 400. Skin. 40. Salk. 668. Action of *ſcandalum*

dalum magnatum laid in *Middleſex*; motion on the common affidavit that the *venue* might be changed into *Suſſex*; lord *Shaftſbury*'s caſe cited, where in a like action the *venue* was changed from *London* into *Middleſex*. *Curia*: That was by reaſon of the great influence that lord had then in *London*. Motion denied. *Paſch.* 9 *W.* 3. *B. R. Duke of Norfolk* againſt *Alderton*, *Carth.* 400. 2 Str. 807. Lord Raym. 1418. See Andr. 198.

Per Holt ch. j. in an action of eſcape, it is not the courſe to change the *venue*. Salk. 670. *Nor eſcape.*

The *venue* is not changeable in an action of covenant. *Taylor* v. *Becket*, *Lev.* 307. *Nor in covenant.*

An action againſt a lighterman for not delivering goods was laid in *London*, where they ſhould have been delivered. It was moved to change the *venue*, becauſe the damage and neglect was in *Kent*. *Sed non allocatur*; the neglect is tranſitory, and not material where it was, and the court will never change the *venue* for a carrier; which is the ſame caſe; otherwiſe perhaps in *diſceit*, or where there is an actual *misfeazance*. Salk. 670. *Nor for a lighterman or carrier.*

Debt for rent laid in *London* on a parol demiſe of lands in *Kent*. *Raymond* ch. j. We never change the *venue* in debt. *Fitz-Gibbon* 166. *Mich.* 4 *Geo.* 2. *B. R. Dupleſſas* v. *Thorp*. *Nor in debt.* 2 Str. 776, 878.

In caſe for a falſe return the action was laid in *Suffolk*, and the defendant moved to change the *venue* into *Middleſex*, becauſe it would raiſe heats in the county; the court inclined to do it, but the plaintiff would not conſent; therefore nothing could be done, becauſe *Nor on a falſe return.*

because he had a right to lay it in either county. *Salk.* 669.

Nor in deceit, &c. Andrews 66.

It is said that the *venue* shall not be changed in action of deceit, or the statute of usury, or on a note of hand.

Venue *shall not be changed where an unfair trial may ensue.*

In an action of false imprisonment against the sheriffs of *London*, laid in *Middlesex*, and changed into *London*, on the common affidavit, the *venue* was removed back into *Middlesex*, it being said, that the officer of the *Compter* was subject to the sheriffs, and so there could be no good trial. *Salk.* 670.

But may for the sake of a fair trial.

In an action of *scandalum magnatum* brought by lord *Shaftsbury* for words spoken in *London*, and the *venue* laid there, it was ruled, by reason of his lordship's great interest in *London*, that the *venue* should be changed, with liberty to lay it in any other county than *London* or *Middlesex*. Skin. 40.

Privilege of a barrister as to the venue.

The plaintiff being a barrister, may lay a transitory action in the county of *Middlesex*, for his attendance is supposed to be continually in the courts at *Westminster*. 2 Show. 176. Mod. 64. Styles 460.

If the defendant be a barrister, he may have the *venue* changed to *Middlesex*. *Ib.* and *Salk.* 668.

But the privilege of the defendant takes not away the privilege of the plaintiff; for if both plaintiff and defendant be barristers, and the plaintiff lays the *venue* in *Middlesex*, the court will not change it. 2 *Show.* 176.

The *venue* being changed on the common affidavit, it was moved on behalf of the plaintiff, that he being a barrister at law, the *venue* might be in *Middlesex*, *secundum privilegium.*

legium. And though it was alledged that he had diſcontinued his practice, and lived in the country for many years paſt, yet becauſe he had been a practiſer here, it was ordered to lie in *Middleſex.* 2 Show. 242.

Barriſter and maſter in chancery.

The *venue* was changed from *Middleſex* upon the common affidavit, that the cauſe of action (if any) aroſe in *Hampſhire.* But upon ſhewing that the plaintiff was a barriſter and maſter in chancery, the rule was afterwards diſcharged. *Hil.* 2 *Geo.* 2. *Burroughs* v. *Willis,* 2 *R. Raym.* 1556. 2 *Stra.* 822.

Of an attorney or officer of the court.

Said *per cur.* that an attorney or officer of the court, where he is defendant, has no privilege concerning the *venue,* (*Sed vide Salk.* 668. 2 *Show.* 176. *Mod.* 64.) but where he is plaintiff he has the privilege to lay his action in *Middleſex,* and out of the proper county; and the *venue* ſhall not be changed upon the common affidavit by reaſon of his privilege. *Vide antea fol.* 71. *in notis.* Juſtice *Dolben* remembered a caſe where the *venue* was altered upon affidavit, though an attorney was plaintiff, becauſe the matter did ariſe, and all the witneſſes lived in remote parts of the kingdom. *Paſch.* 2 *W. & M. B. R. Biſſe* v. *Harcourt, Carth.* 126. *Show.* 148.

Str. 610. 2 Str. 1049. Andr. 381.

If an attorney is plaintiff, and lays the *venue* in *Middleſex,* the *venue* ſhall not be changed; otherwiſe if in *London.* Salk. 668.

Clerk of aſſiſe.

A clerk of aſſiſe brought an action of aſſault and battery for a battery committed in *Kent,* and laid the action in *Middleſex*; upon the common affidavit the *venue* was changed; but

but upon motion for the plaintiff the rule was ſet aſide, and the *venue* brought back into *Middleſex*. Eaſter 5 Annæ, Knight *v.* Barnaby, 2 R. Raym. 1253. Salk. 670.

Judges clerks. *Powel* j. The privilege extends to judges clerks as well as to ſerjeants at law, barriſters and attornies. *Salk.* 670.

Where ſuch perſons ſue, or are ſued in *auter droit* as heirs, executors or adminiſtrators; they loſe their privilege.

Actions on the caſe, &c. to be laid in their proper counties unleſs, &c. Actions upon the caſe, treſpaſs for goods, aſſault or impriſonment ariſing in any *Engliſh* county, are to be laid in their proper counties, unleſs they ariſe where the juſtices of aſſiſe ſeldom come. And becauſe treſpaſs and trover for goods, battery, impriſonment and ſlander, muſt needs be notorious in what county they ariſe, the attorney knowingly laying them out of their proper counties, (unleſs in the caſes before expreſſed, or for ſuch other cauſes as ſhall be allowed by the judges of the court, and duly appear to be true) ſhall be ſeverely puniſhed. *Mich.* 1654.

Attornies acting otherwiſe, to be puniſhed.

Venue *may be changed before plea.* Before plea, upon oath made, the *venue* may be changed upon motion in the ſaid tranſitory actions, and the defendant to plead to the new action as he ſhould have done to the other, without delay. *Same rule.*

Though defendant comes in by exigent. The *venue* may be changed (upon oath) as before, though the defendant come in by exigent. *Same rule.*

Venue *changed into a county Palatine.* 2 Str. 807. See Andr. 198. A motion to change the *venue* into *Cheſter* was granted, becauſe this court can ſend down the record by *Mittimus*. Trin. 12 Geo. 1. Godfrey *v.* Philpot, 2 R. Raym. 1418.

The

The *venue* was laid in *London*, on affidavit that the cauſe of action aroſe in *Denbighſhire*; motion to change the *venue* into *Salop*, as the next adjacent *Engliſh* county. *Curia:* It cannot be done without conſent, (*Deniſon* j. it was denied to me *Mich.* 8 *Geo.* 2. *Loyd* v. *Williams.* 2 *R. Raym.* 1418.) *Trin.* 19 *Geo.* 2. *Moore* v. *Fennyhouth*, *Stra.* 1258. But notwithſtanding this caſe, Sir *John Strange* obtained a rule to ſhew cauſe, why the *venue* ſhould not be changed from *London* to *Carmarthen*, which, on affidavit of ſervice, was made abſolute, *Trin.* 21 *Geo.* 2. *Tindale* v. *Gwynne*, *Stra.* 1270. *Sed Q.* if he does not mean into the next adjacent *Engliſh* county.

Whether it may be changed into Wales, *or the next adjacent* Engliſh *county.*

Pleas.

PLEAS are either general or ſpecial; a general plea is a conciſe direct anſwer to the plaintiff's declaration, muſt be written on paper with a double penny ſtamp, and delivered to the plaintiff's attorney; but if his place of abode be unknown to you, it may be entered in the general iſſue book, kept by the clerk of the doggets, for which you pay 4*d.* and you pay the plaintiff's attorney 1 *s.* for the entry.

Pleas. General iſſue to be delivered to the plaintiff's attorney.

General iſſues.

Non eſt factum *to a bond.*

And the ſaid *C. D.* by *R. R.* his attorney, comes and defends the force and injury, when, *&c.* and ſays, that he ought not to be charged with the ſaid debt, by means of the ſaid writing obligatory, becauſe, he ſays, that the ſaid writing obligatory is not his deed; and of this he puts himſelf upon the country.

Non eſt factum teſtatoris. Lilly's Ent. 166. 10 Co. 120. b.

And the ſaid *Mary*, by *A. B.* her attorney, comes and defends the force and injury, when, *&c.* and ſays, that ſhe ought not to be charged with the ſaid debt by virtue of the ſaid writing, becauſe ſhe ſays, that the ſaid writing is not the deed of the ſaid Sir *John Stapley*; and of this ſhe puts herſelf upon the country.

Nil debet.

And the ſaid *C. D.* by *A. B.* his attorney, comes and defends the force and injury, when, *&c.* and ſays, that he does not owe to the ſaid *A. B.* the aforeſaid 500*l.* nor any part thereof *, *in manner and form* as the ſaid *A. B.* above complains againſt him; and of this he puts himſelf upon the country.

* Lit. §. 483, 484, 485.

Nil debet *in debt*, qui tam, &c. Lilly's Ent. 175.

And the ſaid *Thomas Fiſſenden* by —— his attorney, comes and defends the force and injury, when, *&c.* and ſays, that he does not owe to the ſaid lord the king and the ſaid *Samuel*, who as well, *&c.* the ſaid two hundred pounds, nor any part thereof, in manner and form as the ſaid *Samuel*, who as well, *&c.* above complains againſt him; and of this he puts himſelf upon the country.

And

And the ſaid *C. D.* by *E. F.* his attorney, comes and defends the force and injury, when, *&c.* and ſays, that he does not detain from the ſaid *A. B.* the ſaid thirty pounds, nor any part thereof, in manner and form as the ſaid *A. B.* above complains againſt him; and of this he puts himſelf upon the country. Non detinet *in debt.* Lilly's Ent. 215. Brownl. 170.

And the ſaid *Thomas Hall*, by *Roger Reeve* his attorney, comes and defends the force and injury, when, *&c.* and ſays, that he did not break the ſaid covenant in the ſaid declaration above ſpecified, as the ſaid *Jane* by her ſaid declaration above ſuppoſes againſt him; and of this he puts himſelf upon the country. Non infregit conventionem. *Poſt.* 182.

And the ſaid *C. D.* by *R. R.* his attorney, comes and defends the force and injury, when, *&c.* and ſays, that he did not undertake in manner and form as the ſaid *A. B.* above complains againſt him; and of this he puts himſelf upon the country. Non aſſumpſit.

And the ſaid *John* and *Mary* by *W. R.* their attorney, come and defend the force and injury, when, *&c.* and ſay, that the ſaid *Joſeph Wilſon* in his life-time did not undertake in manner and form as the ſaid *William* above complains againſt them; and of this they put themſelves upon the country, *&c.* Teſtator non aſſumpſit. Lilly's Ent. 478.

And the ſaid *C. D.* by *T. L.* his attorney, comes and defends the force and injury, when, *&c.* and ſays, that he is in nothing guilty of the premiſſes above laid to his charge, as the ſaid *A. B.* above complains againſt him; and of this he puts himſelf upon the country. Non cul. *in caſe.*

And the ſaid *C. D.* by *W. L.* his attorney, comes and defends the force and injury, when, Non. cul. *in treſpaſs.*

&c. and says, that he is not guilty thereof; and of this he puts himself upon the country.

Son assault.

Lilly's Ent. 470.

And the said *Thomas*, by *T. G.* his attorney, comes and defends the force and injury, when, &c. and as to the coming with force and arms, or whatsoever that is against the peace of our lord the now king, the said *Thomas* says, that he is not guilty thereof; and of this he puts himself upon the country. And the said *Richard* likewise, &c. And as to the residue of the trespass above supposed to be done, the said *Thomas* says, that the said *Richard* ought not to have or maintain his said action thereof against him, because he says, that the said *Richard*, at the said time in which the said trespass is above supposed to be done at *Lewes* in the county aforesaid, with force and arms, &c. made an assault upon the said *Thomas*, and then and there would have beaten, wounded and ill treated the said *Thomas*, if he the said *Thomas* had not then and there presently defended himself against the said *Richard*; whereupon the said *Thomas* then and there defended himself against the said *Richard*; and so the said *Thomas* says, that the mischief or damage, if any then and there happened to the said *Richard*, it was on the proper assault of the said *Richard*, and in the defence of the said *Thomas*; and this the said *Thomas* is ready to * verify: Wherefore he prays judgment, if

* *Certify* instead of *verify*, held to be to the same purpose, and well enough. *Comyns* 5.

if the ſaid *Richard* ought to have or maintain his ſaid action againſt him.

And the ſaid *Richard* ſays, that he ought not, by any thing by the ſaid *Thomas* above in pleading alledged, to be barred from having his ſaid action for the reſidue of the ſaid treſpaſs againſt the ſaid *Thomas*; becauſe he ſays, that the ſaid *Thomas*, on the day and year aforeſaid in the ſaid declaration mentioned, at *Lewes* aforeſaid in the county aforeſaid, * of his own proper injury, without any ſuch cauſe as by the ſaid *Thomas* is above in pleading alledged, made an aſſault upon the ſaid *Richard*, and beat, wounded and ill treated him the ſaid *Richard*, in manner and form as the ſaid *Richard* above complains thereof againſt the ſaid *Thomas*; and this he prays may be inquired of by the country, and the ſaid *Thomas* likewiſe, &c. Therefore, as well to try that iſſue, as the ſaid other iſſue above joined, between the ſaid parties, let a jury come thereupon before our lord the king at *Weſtminſter*, on *Thurſday* next after three weeks of the Holy Trinity, and who are in no wiſe of kin either to the ſaid *Richard*, or to the ſaid *Thomas*, to take cognizance upon their oaths of the whole truth of the premiſſes; becauſe as well the ſaid *Thomas*, as the ſaid *Richard*, have put themſelves upon that jury. The ſame day is given to the parties aforeſaid, at the ſame place.

Replication de injuria ſua propria.

Award of ven. fac. to try two iſſues. Poſt. 183, 185.

* Where *de injuria ſua propria* is not good, ſee *Cregate's* caſe, 8 Ca. 66. *b.* *Comyns* 382.

Non infregit conventionem. *Ante* 179.

And the ſaid *John Knap*, by *Thomas Harvey his* attorney, comes and defends the force and injury, when, *&c.* and ſays, that he did not break the ſaid covenants, nor any one of them, in manner and form as the ſaid *William Simpſon* above complains thereof againſt him; and of this he puts himſelf upon the country.

* Plene adminiſtravit *by an executor.*

And the ſaid *Mary*, by *Walter Jobber* her attorney, comes and defends the force and injury, when, *&c.* and ſays, that the ſaid *Sarah* ought not to have or maintain her ſaid action thereof againſt her the ſaid *Mary* becauſe ſhe ſays, that the ſaid *Mary* hath fully adminiſtred all and ſingular the goods and chattels, which were the goods and chattels of the ſaid *William Bury* at the time of his death, in her hands to be adminiſtred; and that ſhe the ſaid *Mary* has not, nor at the time of exhibiting the bill aforeſaid, or at any time ſince, had any goods or chattels which were the goods and chattels of the ſaid *William Bury* at the time of his death, in her hands to be adminiſtered, whereby the ſaid *Sarah* might have been ſatisfied of the damages aforeſaid, or any part thereof; and this ſhe the ſaid *Mary* is ready to verify: Wherefore ſhe prays judgment, whether the ſaid *Sarah* ought to have or maintain her action aforeſaid thereof againſt her. *&c.*

And

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* *Plene adminiſtravit* generally not good to a *Scire fac.* upon a judgment againſt the teſtator. *R. Raym.* 2 *Salk.* 296. 4 *Mod.* 296. *Skin.* 565.

And the ſaid *Sarah* ſays, that ſhe, by reaſon of any thing by the aforeſaid *Mary* above by pleading alledged, ought not to be barred from having her ſaid action againſt her the ſaid *Mary*, becauſe ſhe ſays, that the ſaid *Mary* has, and at the time of exhibiting the bill aforeſaid, that is to ſay, on the day of in the year of the reign of our ſovereign lord *George* the third, now king of *Great Britain*, *&c.* at *Weſtminſter* in the county aforeſaid, had divers goods and chattels, which were the goods and chattels of the ſaid *William Bury* at the time of his death, in her hands to be adminiſtred, ſufficient to ſatisfy the ſaid damages, whereof ſhe the ſaid *Sarah* might have been ſatisfied her damages aforeſaid; and ſhe prays, that this may be inquired of by the country; and the ſaid *Mary* likewiſe, *&c.* Therefore let a jury come thereupon before our lord the king at *Weſtminſter*, on next after and who are in no wiſe of kin either to the ſaid *Sarah*, or to the ſaid *Mary*, to take cognizance, upon their oaths, of the whole truth of the premiſſes; becauſe as well the ſaid *Mary*, as the ſaid *Sarah*, have put themſelves upon that jury. The ſame day is given to the parties aforeſaid at the ſame place.

Replication.

Iſſue.

Venire facias *awarded.*

Ante 181.

Poſt. 185.

And the ſaid *Edward Tanner*, by *B. H.* his attorney, comes and defends the force and injury, when, *&c.* and ſays, that the ſaid *Richard* ought not to have or maintain his ſaid action thereof againſt him, becauſe he ſays, that he has fully adminiſtred all the goods and chattels which were of the ſaid *Anthony Tanner* at the time of his death in

Plene adminiſtravit præter 171. Lilly's Ent. 475.

his hands to be adminiſtered, except goods and chattels to the value of ſeventeen pounds; and that he the ſaid *Edward* has no goods or chattels which were of the ſaid *Anthony* at the time of his death in his hands to be adminiſtred, nor had on the day of exhibiting the ſaid bill of the ſaid *Richard*, nor at any time afterwards, except the ſaid goods and chattels to the value of the ſaid ſeventeen pounds; and this he is ready to verify: Wherefore the ſaid *Edward* prays judgment, if the ſaid *Richard* ought to have or maintain his ſaid action againſt him, except of the ſaid ſeventeen pounds, *&c.*

Repl. praying judgment for the 17 l. *and damages.*

And the ſaid *Richard*, as to the ſaid ſeventeen pounds which the ſaid *Edward* acknowleges to have in his hands to be adminiſtred, prays judgment; and that the ſaid ſeventeen pounds, together with his damages by occaſion of detaining the ſaid ſeventeen pounds, may be adjudged to him; It is therefore conſidered, that the ſaid *Richard* recover againſt the ſaid *Edward* the ſaid ſeventeen pounds of the goods and chattels which were of the ſaid *Anthony*; and the ſaid *Edward* in mercy, *&c.*

Judgment.

And replicat. further aſſets.

And as to the reſidue of his ſaid damages, the ſaid *Richard* ſays, that by any thing before alledged, he ought not to be barred from having his action thereof againſt the ſaid *Edward*; becauſe, as to the ſaid plea of the ſaid *Edward* above pleaded, the ſaid *Richard* ſays, that on the day of exhibiting the bill of the ſaid *Richard*, to wit, on the ſeventeenth day of *May* in the ſeventh year of the reign of our ſaid lord the king, the ſaid *Edward* had,

had, over and above the ſaid goods and chattels to the value of the ſaid ſeventeen pounds, divers goods and chattels, which were of the ſaid *Anthony* at the time of his death, in his hands to be adminiſtered, to the value of the reſidue of his ſaid damages, out of which he could thereof have ſatisfied the ſaid *Richard*, to wit, at *Southwark* aforeſaid in the aforeſaid county; and this he prays may be inquired of by the country; and the ſaid *Edward* likewiſe, *&c.* And becauſe it is convenient that there be one taxation in this behalf of the damages if judgment happen to be given for the ſaid *Richard* for the ſaid reſidue of the ſaid damages: Therefore let the taxation of damages for not paying the ſaid ſeventeen pounds, which the ſaid *Edward* has acknowledged to have in his hands to be adminiſtred, ceaſe until the iſſue above joined between the ſaid parties be tried and determined; and for trying the ſaid iſſue, let a jury thereupon come before our lord the king at *Weſtminſter*, on next after and who neither, *&c.* to recognize, *&c.* becauſe as well, *&c.* The ſame day is given to the ſaid parties there, *&c.*

Iſſue.

Unica taxatio.

Venire eſſ. ard.

And now at this day, to wit, on *Friday* next after the morrow of the Holy Trinity, in this ſame term, to which day the ſaid *John Combes*, *John Forſter* and *Charles Wilkinſon*, had leave to imparl to the ſaid bill, and then to anſwer, *&c.* before our lord the king at *Weſtminſter*, came as well the ſaid *Elizabeth* by her attorney aforeſaid, as the ſaid *John Combes*, *John Forſter* and *Charles Wilkinſon*, by *G. W.* their attorney, and the ſaid *John Combes*,

Imparlance.

Combes, *John Forſter* and *Charles Wilkinſon*, defend the force and injury, when, *&c.*——

Two defendants plead non aſſumpſerunt.

And the ſaid *John Combes* and *John Forſter* ſay, that they did not undertake in manner and form as the ſaid *Elizabeth* above complains againſt them; and of this they put themſelves upon the country; and the ſaid *Elizabeth* does ſo likewiſe, *&c.*

Third defendant pleads double non aſſumpſit,

And the ſaid *Charles* ſays, that the ſaid *Elizabeth* ought not to have or maintain her ſaid action againſt him, becauſe he ſays, that he did not undertake in manner and form as the ſaid *Elizabeth* above complains againſt him; and of this he puts himſelf upon the country; and the ſaid *Elizabeth* does ſo likewiſe.

and bankruptcy. Lilly's Ent. 106.

And the ſaid *Charles*, by leave of the court here, and according to the form of the ſtatute in ſuch caſe lately made and provided, further ſays, that the ſaid *Elizabeth* ought not to have her ſaid action againſt him the ſaid *Charles* becauſe he ſays, that he the ſaid *Charles*, after the twenty-fourth day of *June* in the year of our lord one thouſand ſeven hundred and ſixty-ſeven, to wit, on the ſeventh day of *September* in the ſeventh year of the reign of our ſovereign lord *George*, now king of *Great Britain*, at *London* aforeſaid, in the pariſh and ward aforeſaid, became a bankrupt within the ſeveral ſtatutes made againſt bankrupts; and the ſaid *Charles*, according to the form of the ſtatute lately made and provided, further pleads and ſays, that the cauſe of the ſaid action above ſpecified in the ſaid declaration, accrued to the ſaid *William* in his life-time, before the ſaid time in which he the ſaid *Charles* ſo as

aforeſaid became a bankrupt; * and of this he puts himſelf upon the country, &c.

Replication confeſſing the bankruptcy; but avers, that he and the other defendants, &c. ſuper ſe aſſumpſer,' &c.

And the ſaid *Elizabeth*, as to the ſaid plea of the ſaid *Charles* laſt pleaded, ſays, that true it is, that the ſaid *Charles* became a bankrupt in manner and form as the ſaid *Charles* by his plea laſt mentioned has alledged; but the ſaid *Elizabeth* further ſays, that the ſaid *Charles*, together with the ſaid *John Combes* and *John Forſter*, undertook in manner and form as the ſaid *Elizabeth* above complains againſt them; and this ſhe is ready to verify; and ſhe prays judgment and her damages by occaſion of the premiſſes to be adjudged to her, &c. and upon this the ſaid *Elizabeth* prays, that the ſaid *Charles* may rejoin to her laſt replication. Upon this a day is given to the ſaid *Charles* before our lord the king at *Weſtminſter* until *Friday* next after the octave of St. *Martin* then next enſuing, to rejoin, &c. at which day before our lord the king at *Weſtminſter* the ſaid *Elizabeth* came by her attorney aforeſaid; and the ſaid *Charles* at that day, although ſolemnly demanded, came not, but made default; and ſays nothing elſe in bar or preclusion of the ſaid action of the ſaid *Elizabeth*, by which the ſaid *Elizabeth* remains thereof undefended againſt the ſaid *Charles*

Third defendant makes default.

* A plea of bankruptcy ought to conclude to the country. *Mich.* 5 *Geo.* 2. *B. R. Burden* v. *Tomling. Mich.* 2 *Geo.* 2. *ſcacc. Britton* v. *Loſſel. Hill.* 4 *Geo.* 2. *C. B. Fuller* v. *Burden. Paſch.* 7 *Geo.* 2. *C. B. Poole* v. *Broadfield. Forteſc. Rep.* 334. *Miles* v. *Williams*, *Wm. Rep.* 249. 10 *Mod.* 160, 243. *Andr.* 176.

Venire facias tam ad triand', quam ad inquirend.'

Charles as to the laſt plea, *&c.* Therefore, as well to try the ſaid ſeveral iſſues above joined between the ſaid *Elizabeth* and the ſaid *John Combes*, *John Forſter* and *Charles Wilkinſon*, as to inquire what damages the ſaid *Elizabeth* has ſuſtained by the ſaid *Charles* by occaſion of the premiſſes, if a verdict ſhall happen to be given in the ſaid plea for the ſaid *Elizabeth*; let a jury come before our lord the king at *Weſtminſter* on *Wedneſday* next after the octave of St. *Hillary*; and who neither, *&c.* to recognize, *&c.* becauſe as well, *&c.* The ſame day is given to the parties aforeſaid at the ſame place, *&c.*

Judgment for the plaintiff affirmed on a writ of error in the *Exchequer* chamber. *Mich.* 4 *Geo.* 1.

Non cul. infra ſex annos. Lilly's Ent. 483.

And the ſaid *John Oufman*, by *Thomas Harvey* his attorney, comes and defends the force and injury, when, *&c.* and ſays, that the ſaid *Richard Gibſon* ought not to have or maintain his ſaid action againſt him, becauſe he ſays, that the ſaid bill of the ſaid *Richard* was exhibited on the twenty-third of *October* in the ſeventh year of the reign of our ſovereign lord *George* the third, now king of *Great Britain*, *&c.* and not before; and that he the ſaid *John* at any time within ſix years next before the exhibiting the ſaid bill of the ſaid *Richard*, was in no wiſe guilty of the premiſſes above laid to his charge, as the ſaid *Richard* above thereof complains againſt him; and this the ſaid *John* is ready to verify: Wherefore he prays judgment, if the ſaid *Richard* ought to have or maintain his ſaid action againſt him, *&c.*

And

And the ſaid *Thomas*, by ——— *Packlington* his attorney, comes and defends the force and injury, when, &c. and ſays, that the ſaid *William* ought not to have or maintain his ſaid action againſt him the ſaid *Thomas*, becauſe he ſays, that the ſaid *William Pentlowe* did not demiſe to the ſaid *Thomas Wilſon* the ſaid tenements with the appurtenances in manner and form as the ſaid *William Pentlowe* above complains againſt him; and of this he puts himſelf upon the country. Non dimiſit.

And the ſaid *William Jones*, by *John Howard* his attorney, comes and defends the force and injury, when, &c. and ſays, that he does not detain from the ſaid *John Roberts* the ſaid goods and chattels in the ſaid declaration ſpecified, or any part of them in manner and form as the ſaid *John Roberts* above complains againſt him; and of this he puts himſelf upon the country. Non detinet.

And the ſaid *Robert Tebbut* the younger, by *R. R.* his attorney, comes and defends the force and injury, when, &c. and prays *oyer* of the ſaid writing obligatory; and it is read to him, &c. he alſo prays *oyer* of the condition of the ſaid writing; and it is read to him in theſe words, to wit, The condition of this obligation is ſuch, to wit, &c. Which being read and heard, the ſaid *Robert Tebbut* the younger ſays, that they the ſaid *Emery* and *John* ought not to have or maintain their ſaid action againſt him, becauſe he ſays, that after the making the ſaid writing obligatory, and before the day of exhibiting the ſaid bill of the ſaid *Emery* and *John*, to wit, on *Monday* next after three weeks of St. *Michael* Comperuit ad diem *to a bail-bond.* Lilly's Ent. 498. Oyer.

next enſuing the date of the ſaid writing obligatory in the ſaid condition above mentioned, he the ſaid *Robert Tebbut* the younger, in the ſaid condition above named, appeared before our lord the king at *Weſtminſter*, to anſwer the ſaid *Emery* and *John* of the ſaid plea of treſpaſs, and alſo to the bill of the ſaid *Emery* and *John* againſt the ſaid *Robert Tebbut* the younger, for eight hundred pounds upon promiſe, according to the form and effect of the ſaid condition; and this he is ready to verify by the record of that appearance remaining in the court of our ſaid lord the king, before the king himſelf: Wherefore he prays judgment, if the ſaid *Emery* and *John* ought to have or maintain their ſaid action againſt him, *&c.*

Replication nul tiel record.

And the ſaid *Emery* and *John* ſay, that they, by any thing by the ſaid *Robert Tebbut* the younger above by pleading alledged, ought not to be barred from having their ſaid action againſt him, becauſe they ſay, that there is not any ſuch record of the ſaid appearance of the ſaid *Robert Tebbut* the younger before our ſaid lord the king in the ſaid court of our ſaid lord the king, before the king himſelf at *Weſtminſter*, on the ſaid *Monday* next after three weeks of St. *Michael*, according to the form and effect of the ſaid condition, as the ſaid *Robert Tebbut* the younger hath above by pleading alledged; and this they are ready to verify: Wherefore they pray judgment and their ſaid debt, together with their ſaid damages by occaſion of the detaining that debt, to be adjudged to them, *&c.*

And

And the ſaid *Robert Tebbut* the younger ſays, that there is ſuch a record of the ſaid appearance of the ſaid *Robert Tebbut* the younger, in the ſaid court of our ſaid lord the king, before the king himſelf, at *Weſtminſter* aforeſaid, on *Monday* next after three weeks of St. *Michael* next enſuing the date of the ſaid writing obligatory, remaining in the ſaid court of our ſaid lord the king, before the king himſelf, at *Weſtminſter* aforeſaid, as he the ſaid *Robert Tebbut* the younger has by pleading alledged; and this he is ready to verify by that record, *&c.* Therefore the ſaid *Robert Tebbut* the younger is commanded to have the ſaid record here on *Thurſday* next after at his peril, *&c.* The ſame day is given to the ſaid *Emery* and *John* there, *&c.* At which day, before our lord the king at *Weſtminſter*, the ſaid parties came by their attornies aforeſaid; and the ſaid *Robert* has not here in court the record of the ſaid appearance by him in form aforeſaid above alledged, but made default therein: It is therefore conſidered, that the ſaid *Emery* and *John* recover againſt the ſaid *Robert* their ſaid debt, and alſo ſixty-three ſhillings for their damages which they have ſuſtained as well by occaſion of the detaining that debt, as for their coſts and charges by them about their ſuit in this behalf expended, by the court of our ſaid lord the king now here adjudged to the ſaid *Emery* and *John* by their aſſent; and the ſaid *Robert* in mercy, *&c.*

Rejoinder habetur tale record.

Day given to bring in the record.

Def. defecit de record.

Judgment thereon.

And the ſaid *James Silverlock*, by *L. R.* his attorney, comes and defends the force and injury,

Infra ætate *to* aſſumpſit

for taylors work. Lilly's Ent. 107. Andr. 277.

injury, when, &c. and ſays, that the ſaid *John Thompſon* ought not to have or maintain his ſaid action againſt him, becauſe he ſays, that he the ſaid *James Silverlock*, at the time of making the ſeveral promiſes and undertakings in the ſaid declaration above mentioned, was within the age of one and twenty years; and this he is ready to verify; Wherefore he prays judgment, if the ſaid *John Thompſon* ought to have or maintain his ſaid action againſt him, &c.

Replication that they were for neceſſaries.

And the ſaid *John Thompſon* ſays, that he, by any thing by the ſaid *James Silverlock* above by pleading alledged, ought not to be barred from having his ſaid action againſt the ſaid *James*, becauſe he ſays, that the ſaid thirty pounds expended and laid out by the ſaid *John* for the ſaid *James*, and the ſaid taylors work done and performed by the ſaid *John*, together with the materials and neceſſary things uſed in and about that work, and by the ſaid *John* for the ſaid *James* in form aforeſaid found and provided, were expended and laid out, done and performed, found and provided by the ſaid *John* at *London* aforeſaid, in the pariſh and ward aforeſaid for the neceſſary apparel and cloathing of the ſaid *James*, his degree requiring the ſame; and this he is ready to verify; Wherefore he prays judgment, and his ſaid damages by occaſion of the premiſſes, to be adjudged to him, &c.

Edward Northey.

And

And the ſaid *James* ſays, that the ſaid thirty pounds by the ſaid *John* laid out and expended, and the ſaid taylor's work by the ſaid *John* done and performed, together with the materials and neceſſary things uſed in and about that work, and by the ſaid *John* for the ſaid *James* in form aforeſaid found and provided, were not for the neceſſary apparel and cloathing of the ſaid *James*, in manner and form as the ſaid *John* has above by replying alledged; and of this he puts himſelf upon the country.

F. Pemberton.

Rejoinder not for neceſſaries.

If four terms be elapſed after the declaration is delivered, the defendant ſhall have a whole term's notice to plead before judgment can be entered againſt him, unleſs the cauſe has been ſtayed by injunction or privilege.

Term's notice to plead after four terms are elapſed.

If the plaintiff amends his declaration, the defendant ſhall have two days, excluſive of the day of amendment, to alter his firſt plea, or plead any other.

Two days after amendment, to alter or vary the plea.

A defendant having pleaded to iſſue, and the plaintiff neglecting to enter the iſſue the ſame term the iſſue is joined, the defendant within the firſt five days of next term may alter his plea or demurrer, and plead another plea if he pleaſes.

When defendant may vary his plea.

The defendant pleaded the general iſſue, but forgot to give notice at the ſame time of a ſet-off. And upon motion in time, the court gave leave to withdraw the plea, in order to deliver the ſame plea again with a

Leave to withdraw the general iſſue, in order to plead it again, with notice of a ſet-off.

proper notice to ſet-off. And ſaid it had been done ſo before. *Paſ.* 20 *Geo.* 2. *B. R. Blackbourn* v. *Matthias*, 2 *Stra.* 1267.

Infant defendant muſt be admitted to plead by guardian.

If an infant be ſued, he can't regularly plead by guardian until admitted ſo to do by ſome judge of the court, and ſuch admittance made a rule of court. But if he ſhould, it is only a miſdemeanor in the attorney, but not error.

Paying money into court.

When the diſpute betwixt the plaintiff and defendant is only how much is due to the plaintiff, and not whether any thing at all is due to him, the defendant before he pleads muſt move the court to pay into court what is really due to the plaintiff; and upon ſuch motion the court will order, that the defendant ſhall have leave to bring into court the ſum the defendant moves to pay in; and thereupon, unleſs the plaintiff ſhall accept thereof, with coſts to be taxed by the maſter, in full diſcharge of the ſuit, the ſum brought in ſhall be ſtruck out of the declaration, and paid out of court to the plaintiff or his attorney; and upon the trial of the iſſue, the plaintiff ſhall not be permitted to give evidence for the ſaid ſum ſo paid in. After having drawn up the rule, you pay the money to the ſigner of the writs, who acts as clerk or agent to the ſecondary herein, the ſecondary being by rule of court made *Paſ. quinto Jacobi* 1. the officer appointed for that purpoſe.

The rule.

To whom the money is to be paid.

Muſt plead the general iſſue.

After the defendant has paid in the money, he muſt ſerve the plaintiff's attorney with the rule, and give him the general iſſue. And if the plaintiff accepts the money in full diſcharge

charge of the ſuit, he ſhall have his coſts to the time the money is paid in. But if he will not accept it in full diſcharge, he may take the money out of court in part of his demand, and go on with the action. But if on the trial he does not obtain a verdict for a greater ſum than was paid into court, he will be nonſuited, and muſt pay coſts to the defendant. *Vide Salk.* 583, 596, 597.

The effect and conſequence of paying money into court.

No ſum, how ſmall ſoever, to be paid into court without leave to be obtained on motion.

Money not to be paid into court without leave.

The court gave leave to withdraw the general iſſue, in order to bring money into court and replead it; within the reaſon of *Blackbourn* v. *Matthias* (2 *Str.* 1267.) not delaying the plaintiff. *Trin.* 21 *G.* 2. *B. R. Tarlton* v. *Wragg*, 2 *Str.* 1271.

Leave to withdraw the general iſſue, in order to bring money into court, and replead it.

In any action of debt, covenant, or other action on any policy of aſſurance, money may be brought into court. *Stat.* 19 *Geo.* 2. *c.* 37. §. 7.

Rule to pay money into court, and have it ſtruck out of the declaration, upon payment of coſts (in an action upon the caſe for the uſe and occupation of an houſe) was diſcharged as to the coſts, (*i. e.* permitted to done without paying coſts) the plaintiff's action to be brought and kept on foot, very oppreſſively. *Bur. Rep.* 578, 579.

Lord *Mansfield* obſerved, that where the defendant applies to pay money into court, and to have the demand thereupon ſtruck out of the declaration, the *law* ariſes upon the fact; and the true and ſenſible diſtinction is, "That where the ſum demanded is a

ſum certain, or capable of being *aſcertained by mere computation*, without leaving any other ſort of diſcretion to be exerciſed by the jury; it is right and reaſonable to admit the defendant to pay the money into court, and have ſo much of the plaintiff's demand upon him ſtruck out of the declaration; and that if the plaintiff will not accept it, he ſhall proceed at his peril." 2 *Bur. Rep.* 1120.

If ſuit by original, need not plead 'till oyer of original.

The defendant is not bound to plead to a declaration by original, 'till oyer and a copy of the original is given him, if he demands it. But I have been refuſed it in the *Common Pleas*, where I have heard a defendant has received ſome relief upon propoſing a bill of exceptions.

If a judgment pleaded, term and number-roll to be given if demanded.

Where any perſon ſhall plead a judgment or matter of record in the ſame court, the party ſo pleading the ſame ſhall upon demand give the attorney for the plaintiff a note in writing of the term, and number-roll whereon ſuch judgment or matter of record is entered and filed; and in default thereof ſuch plea is not to be received.

And oyer of deeds, &c. pleaded by profert in curia.

If the plaintiff in his declaration makes a *profert in curia* of any deed or other writing, letters of adminiſtration, or the like, the defendant may pray oyer thereof, and muſt have a copy delivered him, paying for the ſame after the rate of four-pence *per* ſheet, beſides ſtamp-duty, and ſhall have ſuch time after to plead as he had when he demanded oyer.

Time to plead after. Str. 705.

On pleading a record in the ſame court,

Plea in abatement, another action depending in this court, counſel craved oyer of the record, and moved, that unleſs the defendant

gave oyer the next day, the plaintiff might ſign judgment. *The defendant muſt give oyer if demanded.*

Holt ch. j. Where a record of the ſame court is pleaded in abatement, and the plaintiff demands oyer of that record, and 'tis not given him in convenient time, the plea ought not to be received, but the plaintiff may ſign his judgment on rule. *Judic. pro Q. niſi* Oyer the next day. *Carth.* 453.

Plea in abatement, another action depending for the ſame matter in this court.

Replication, *Quod non habetur aliquod tale recordum, & petit quod recordum illud, &c. inſpiciatur*, without giving the defendant liberty to rejoin, *Quod habetur tale recordum.* *On replication of* nul tiel record *no occaſion for a rejoinder.*

Demurrer.

Judic. pro Q. being a record of the ſame court, the plaintiff might pray that it might be inſpected by the court, as in *Dyer* 227, 228. which was the plaintiff's precedent in this caſe.

Per cur': *Upon this plea the plaintiff might have prayed oyer of the record, and for want of oyer ſigned judgment, which is the quickeſt method of proceeding.* Carth. 517. But final judgment ought not to be ſigned, but only *quod reſpondeat ulterius*, for failure of record is not peremptory. *Per Holt* ch. j. *R. Raym.* 550. S. C.

If a defendant is bound by a rule or order of court, to plead by a time therein limited, it is incumbent on him to plead by ſuch time although the plaintiff does not enter any rule to plead, or call for a plea. *When defendant muſt plead without a demand of a plea.*

Copy of general iſſue or demurrer to be delivered, and paid for at four pence per *ſheet.*

Upon giving any general iſſue, or general demurrer to any declaration, (before any ſpecial demurrer or ſpecial plea pleaded) the plaintiff's attorney ſhall deliver to the defendant's attorney a copy of ſuch iſſue, or of the demurrer-book; and the defendant's attorney ſhall pay for the ſame, beſides the duty, after the rate of four-pence *per* ſheet, computing 72 words to every ſheet. And if the defendant's attorney ſhall not pay for ſuch copy of any general iſſue or demurrer, and for the ſtamps, upon the tender of the ſame the plaintiff's attorney may ſign his judgment as if no plea or demurrer had been given or pleaded. *Trin.* 12 *W.* 3. *vide Salk.* 4. *pl.* 11.

Otherwiſe judgment.

Special pleas.

Special pleas, which ſet forth the matter pleaded at large, muſt be ſigned by counſel, and are of two ſorts, in abatement and bar.

A plea in abatement.

A plea in abatement, often merely dilatory, is not a plea to the action, but to the bill or writ (if by original.)

In bar.

A plea in bar is to the action, and deſtroys it for ever.

Cauſes of abatement.

Pleas in abatement are for many cauſes; as for that the plaintiff is an alien enemy, is outlawed or excommunicated, privilege in the defendant as being an attorney of the *Common Pleas*, or the like, variance between the original and declaration, for that the teſtator made two executors, and but one is named in the bill; for *miſnomer*, *cum multis aliis.*

* And the ſaid *Robert Parry*, by *Robert Richardſon* his attorney, comes and defends the force and injury, &c. and prays judgment of the † bill aforeſaid, becauſe he ſays, that the ſaid *William Hunt*, upon the tenth day of *November* in the year of our lord 1768, at *Weſtminſter aforeſaid*, died inteſtate; after whoſe death, adminiſtration of all and ſingular the goods and chattels, rights and credits, which were the ſaid *William Hunt*'s

That the defendant is adminiſtrator, and not executor. Lilly's Ent. 5. Andr. 328. 2 Str. 1106.

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* An adminiſtrator may plead a recovery againſt him as executor, and that he hath not aſſets *ultra*. Cro. Eliz. 646. So in debt againſt two executors they may plead a judgment againſt one of them as adminiſtrator; for though he might have abated the writ, yet being for a juſt debt he was not bound ſo to do. 1 *Lev.* 261. 1 *Sid.* 404. *Vide Cro. Eliz.* 471. 1 *Sid.* 334. *Comb.* 221.

If an action is brought againſt one as executor, he may plead in abatement, that he is adminiſtrator, &c. but he cannot plead it in bar. *Salk.* 296. *Styles* 385. *Comb.* 220, 221.

† Caſe *ſur aſſumpſit* againſt an executor. Plea *petit judicium ſi ipſe ad billam prædictam reſpondere debeat, quia dicit*, that adminiſtration was granted to him; in which caſe he ought to be ſued as adminiſtrator, and not as executor; and concludes *petit judicium ſi ipſe ad billam prædictam reſpondere compelli debeat, &c.* 1ſt Objection. The defendant has not travered that he did not adminiſter as executor before the letters of adminiſtration granted. *Curia:* That would be to traverſe what is not alledged in the declaration, which is againſt a rule of law. 2d Objection. The concluſion of the plea is not in abatement. *Curia:* This is a proper concluſion to the juriſdiction, which is ſometimes *ſi curia cognoſcere velit*, but it cannot be good in abatement; and therefore judgment to anſwer over. 1 *R. Raym.* 63, 64. *Salk.* 297, 298. *Carth.* 363. 5 *Mod.* 136, 145. 3 *Danv. Abr.* 414. *p.* 23.

at the time of his death, by *William*, by divine providence, archbiſhop of *Canterbury*, primate of all *England*, and metropolitan, on the 22d day of *January* in the year of our lord 1768, at *Weſtminſter* aforeſaid, in due form of law was committed to the ſaid *Robert*; in which caſe the ſaid *Francis* ought to have named the ſaid *Robert* in his ſaid bill, adminiſtrator of the goods and chattels, rights and credits, which were the ſaid *William*'s at the time of his death, who died inteſtate, and not executor of the laſt will and teſtament of the ſaid *William*; and this he is ready to verify: Wherefore he prays judgment of the † bill aforeſaid, and that the ſaid † bill may be quaſhed; with this, that the ſaid *Robert* will verify, that he did not adminiſter any goods or chattels, rights or credits of the ſaid *William*, before the ſaid adminiſtration committed to him, as aforeſaid.

And

† See the laſt note. *Northey: Petit judicium de narratione* is always in bar in this court; in abatement it is *petit judicium de billa, et quod billa caſſetur*, and judgment *quod billa caſſetur* cannot be given when it is not prayed. *Holt* ch. j. That is true in demurrers, but not in pleas, becauſe there it is *action' non*; for a man may plead in abatement of the declaration. *Trin.* 13 *W.* 3. *B. R. Medina* v. *Stoughton*, 1 *R. Raym.* 593.

A plea which begins with a *petit judicium de narratione*, and concludes *quod narratio caſſetur*, is a plea in bar in this court, and has been ſo often adjudged. *Hil.* 13 *Geo.* 1. *B. R. Watts et Ux'* v. *Goodman*, 2 *R. Raym.* 1460. *Vide* 2 *R. Raym.* 1205.

Pleas in abatement, being found againſt him that pleads them, are peremptory againſt him. 2 *Sid.* 252. 1 *Lev.* 163.

And the ſaid *Elizabeth*, by *Arthur Stone* her attorney, comes and defends the force and injury, *&c.* and ſaith, that the aforeſaid *Thomas Maſon*, in his life-time, to wit, on the twenty-ninth day of *November* in the year of our lord one thouſand ſeven hundred and ſixty-ſeven, at the pariſh aforeſaid in the county aforeſaid, made his laſt will and teſtament, and thereby conſtituted and appointed the ſaid *Elizabeth* ſole executrix of the ſaid teſtament; and afterwards the ſaid *Thomas Maſon* died there, after whoſe death the ſaid *Elizabeth*, at the pariſh aforeſaid, took upon her the burthen and execution of the ſaid teſtament, and proved the ſame in due form of law, without this, * that the ſaid *Thomas Maſon* died inteſtate, as is above ſuppoſed by the ſaid bill; and this ſhe is ready to verify: Wherefore, becauſe the ſaid *Elizabeth*, in the ſaid bill, is not named executrix of the teſtament of the ſaid *Thomas Maſon*, the ſaid *Elizabeth* prays judgment of the ſaid bill, and that the ſaid bill may be quaſhed.

That defendant is executrix, and not adminiſtratrix.

No dilatory plea ſhall be received, unleſs the party offering ſuch plea does by affidavit prove the truth thereof, or ſhew ſome probable matter to the court, to induce them to believe

No dilatory plea without an affidavit of the truth of it.

* *Holt* ch. j. If one ſued as adminiſtrator of *J. S.* pleads that he is executor, he muſt go on and traverſe *abſque hoc*, that the ſaid *J. S.* died inteſtate; and the reaſon is, becauſe unleſs there was a dying inteſtate, no action can be brought againſt one as adminiſtrator, and to ſay he was made executor is by implication only an anſwer to the dying inteſtate. *Salk.* 297, 298.

Str. 639. R. Raym. 1409. 2 Str. 738, 1161.

believe that the fact of ſuch dilatory plea is true. *Stat.* 4 & 5 *Annæ*, *c.* 16. §. 11.

Affidavit of the truth of a plea in abatement.

Robert Parry of the *Strand* in the county of *Middleſex*, perfumer, defendant in this cauſe, maketh oath, and ſaith, that *William Hunt*, mentioned in the plaintiff's declaration in this cauſe, died inteſtate, as this deponent verily believes; and this deponent ſays, he never heard or knew that the ſaid *William* made any will, or appointed any executor, and that on the 22d day of *January* in the year of our lord one thouſand ſeven hundred and ſixty-ſeven, adminiſtration of all and ſingular the goods, rights and credits, which were the ſaid *William Hunt*'s at the time of his death, was duly granted to this deponent by *William*, by divine providence, archbiſhop of *Camterbury*, primate of all *England*, and metropolitan. And this deponent ſaith, that he did not adminiſter any of the goods, chattels, rights or credits, which were of the ſaid *William Hunt*'s, at the time of his death, before the granting the ſaid adminiſtration to this deponent as aforeſaid. And this deponent further ſaith, that the ſubſtance and matter of fact contained in the plea hereunto annexed, are true.

Miſnomer *pleaded in abatement.* Salk. 712.

And lady *Honoria Gerard*, againſt whom the ſaid *Thomas* hath exhibited his bill by the name of lady *Elizabeth Gerard*, otherwiſe *Garret*, comes in his proper perſon and defends the force and injury, *&c.* and prays judgment of the ſaid bill, becauſe ſhe ſays, that ſhe was baptized by the name of *Honoria*, to wit, at the pariſh of St. *Clement Danes* aforeſaid, and from her baptiſm hitherto has been always known

known and named by that name, without this, that ſhe the ſaid *Honoria* now is, or ever was, known or named by the name of *Elizabeth*, as by the ſaid bill is above ſuppoſed; and this ſhe is ready to verify: Wherefore ſhe prays judgment of the ſaid bill, and that the ſaid bill may be quaſhed, *&c.* *Traverſe.* Salk. 6.

Et præd' Johannes Germyn venit & defendit, &c. et dicit, that his name is *Germy*. Demurrer. *Et judic. pro quer.* The defendant ſhould have pleaded it thus: Miſnomer *ill pleaded.*

Et præd' Johannes Germy qui per nomen Johannis Germyn ſuperius implacitatur venit & dicit, &c. Carth. 207.

And the ſaid *Anne*, who is within the age of twenty-one years, by *R. C.* her guardian, by the court of our ſaid lord the king now here ſpecially admitted, comes and defends the force and injury, *&c.* and prays judgment of the ſaid bill, becauſe, ſhe ſays, that ſhe the ſaid *Anne* was, on the day of exhibiting the ſaid bill, and is now, within the age of twenty-one years, to wit, of the age of nineteen years, and not more, to wit, at *London* aforeſaid, in the pariſh and ward aforeſaid; and that the ſaid *Richard* proſecuted his ſaid bill againſt her the ſaid *Anne*, neither by her next friend, nor by her guardian; and this ſhe is ready to verify; Therefore ſhe prays judgment of the ſaid bill, and that the ſaid bill may be quaſhed, *&c.* *Infancy by guardian.*

You may plead in abatement of a declaration where it is by original, for the pleas there are different; but if the action is by bill, you cannot plead in abatement of the declaration, but only of the bill, for they are the ſame thing; *When the defendant muſt plead in abatement of the declaration, and when of the bill.*

thing; and therefore the entry in ſuch caſe is *per' judic. de billa.* 5 Mod. 144. Fitz-G. 256.

Matters that need not be pleaded, but may be given in evidence on the general iſſue.

The pleading a releaſe, coverture or infancy in an *aſſumpſit* is good; and yet theſe things may be given in * evidence upon *non aſſumpſit*; *D.* may not be willing to put ſuch matters of law to the judgment of a jury, or perhaps may deſign to ſave the coſts of a ſpecial verdict. *Trin. 7 W. 3. B. R. Huſſey* v. *Jacobs, Carth.* 356.

When pleas in abatement to be pleaded. Mod. 14. Str. 523, 532. 2 Str. 1192. *Caſes* Temp. Holt 524.

Every plea to the juriſdiction of the court, or in abatement, ought to be pleaded before the rule for pleading is out, and cannot be pleaded after an imparlance, unleſs the declaration is delivered ſo late in the term, that the defendant is not bound to plead to it that term, or is delivered after term; in both which caſes the defendant may, within the firſt

* Wherever the defendant may avoid the action of the plaintiff for matter of law, he may there plead ſpecially, notwithſtanding the ſame matter might be given in evidence upon the general iſſue, and ſhall not be obliged to plead the general iſſue, and leave the matter of law to a jury. In debt on a bond the defendant may plead coverture, though it may be given in evidence on *non eſt factum.* Trin. 8 W. 3. Huſſey *and* Jacob, Comyns 4. Vide Cro. Eliz. 871, 900. 1 Vent. 2. 2 Vent. 295.

Aſſumpſit for money lent and money laid out; infancy may be given in evidence; the promiſe of an infant is abſolutely void, but a bond takes effect, and conſequently is a more deliberate act, and therefore only voidable. *Darby* v. *Boucher, Salk.* 279. 2 *Lev.* 144. *Salk.* 386, 387. 5 *Mod.* 368. 1 *Will.* 559.

The defendant being married at the time of the debt contracted, may give the marriage in evidence on *non aſſumpſit.*

firſt four days inclusive of the next term, plead any plea in abatement, or to the juriſdiction of the court, as of the precedent term. But if ſuch plea be not delivered, or brought into the office before the expiration of the ſaid four days, (whether a rule to plead be given or not) ſuch plea is not to be received; and *Sunday*, and any day, on which the court doth not ſit, is to be accounted as one of the four days, unleſs it happens to be the laſt.

Tender to be pleaded in like manner.

Every plea of tender, or other plea, wherein the defendant alledges he was always ready to do any particular act, muſt be pleaded in like manner as pleas in abatement. *Carth.* 413. *Salk.* 622. 1 *R. Raym.* 254. *Forteſc.* 376. *Comb.* 443. *Holt* 556. *Caſes B. R.* 152. 3 *Salk.* 343 *.

On plea of tender, money to be brought into court.

Where a tender is pleaded, the money muſt be brought into court, and the receipt of the officer to whom paid wrote on the plea before it is filed. [The plaintiff cannot proceed for damages after he has accepted the money brought into court. 2 *R. Raym.* 774.]

Plea of antient demeſne.

A plea of antient demeſne, being a plea to the juriſdiction of the court, is not a plea in abatement within the meaning of the act for amendment of the law †.

If

* See 1 *Str.* 638. A ſpecial memorandum ordered, where by a general memorandum the defendant was ouſted of his plea of tender.

† And needs no affidavit to verify it. *Mich.* 13 *Geo.* 1; *Goodtitle* and *Rogers*, 1 *Barnard. B. R.* 7.

Outlawry not to be pleaded a second time.

If the defendant doth plead an outlawry in disability of the plaintiff, and it being reversed, he shall not plead another in disability *.

In case of a dilatory plea, the court will order the defendant to stand by it, or plead peremptorily on the morrow, or instantly.

If the defendant has pleaded a dilatory or frivolous plea, the court upon motion will order, that he shall stand by his plea, or plead some other peremptorily on the morrow, which shall not afterwards be waived; but towards the end of the term (because otherwise there might not be sufficient time to give notice of trial) the court requires the defendant, if he will not abide by his plea, to plead another instantly. But this the court will not do 'till the time allowed by the common rule to plead is expired.

Same with regard to frivolous demurrers.

The rule is the same with regard to frivolous demurrers.

Pleas in bar.

As pleas in abatement conclude to the bill, declaration or writ, and pray that the same may be quashed, pleas in bar conclude to the action, and pray judgment whether the plaintiff ought to have or maintain his action thereupon against the defendant.

A release, an acquittance, acceptance of another thing, statute of limitations, and many other matters, are pleadable in bar.

And

* Plea of ten outlawries on mesne process in disability. Demurrer. *Judic. quod respondeat ulterius.* The plea is ill for duplicity, for the plaintiff was disabled as well by one outlawry as by all the other nine, to which several answers are required. *Trin.* 3 *Jac.* 2. *B. R. Trevilian* v. *Seccomb, Carth.* 8.

And the ſaid *Nicholas* by *Arthur Stone* his attorney, comes and defends the force and injury, when, *&c.* and craves oyer of the ſaid writing obligatory, and it is read to him, *&c.* And he likewiſe craves oyer of the condition of the ſaid writing obligatory, which is read to him in theſe words; The condition of this obligation, *&c.* which being read and heard, the ſaid *Nicholas* ſaith, that the ſaid *William* and *Elizabeth* ought not to have or maintain their ſaid action againſt him the ſaid *Nicholas*, becauſe he ſaith, that after the making of the ſaid writing obligatory, and after the ſaid firſt day of *September*, mentioned in the ſaid condition, and before the day of exhibiting of the bill of them the ſaid *William* and *Elizabeth*, that is to ſay, on the 18th day of *January* in the year of our lord 1768, at *London* aforeſaid, that is to ſay, in the ſaid pariſh of *St. Mary le Bow* in the ſaid ward of *Cheap*, he the ſaid *Nicholas* paid to the ſaid *William* and *Mary* as adminiſtratrix, as aforeſaid, the ſaid ſum of 1315 *l.* 11 *s.* 6 *d.* contained in the ſaid condition, according to the form of the ſtatute in ſuch caſe made and provided, together with all intereſt then due thereon; and this he is ready to verify: Wherefore he prays judgment whether the ſaid *William* and *Elizabeth* ought to have or maintain their ſaid action thereof againſt him the ſaid *Nicholas*, &c. *Plea of payment to a bond according to the ſtatute.*

And the ſaid *William* and *Elizabeth* ſay, that they, for any thing above alledged by the ſaid *Nicholas* in his ſaid plea, ought not to be precluded from having their ſaid action againſt him the ſaid *Nicholas*, becauſe they ſay *Replication.*

ſay that the ſaid *Nicholas* hath not paid to them the ſaid *William* and *Elizabeth* the ſaid ſum of 1315 *l.* 11 *s.* 6 *d.* with all Intereſt thereon due, in ſuch manner and form as the ſaid *Nicholas* hath above alledged in his ſaid plea; and this they pray may be inquired of by the country; and the ſaid *Nicholas* doth ſo likewiſe. Therefore, *&c.*

Iſſue.

* Non aſſumpſit infra ſex annos. Stat. 21 Jac. 1. c. 16.

And the ſaid *R.* by *Martin Lantrow* his attorney, comes and defends the force and injury, when, *&c.* and ſaith, that the ſaid *T.* ought not to have or maintain his ſaid action thereof againſt him, becauſe he ſays, that he the ſaid *R.* did not at any time within ſix years next before the day of the exhibiting of the bill of the ſaid *T.* undertake in manner and form as the ſaid *T.* above complains againſt him; and this he is ready to verify: Wherefore he prays judgment, whether the ſaid *T.* ought to have or maintain his ſaid action thereof againſt him.

Replication.

And the ſaid *T.* ſays, that he, by any thing by the ſaid *R.* above by pleading alledged, ought not to be barred from having his ſaid action againſt him, becauſe he ſays, that

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* Of pleading the ſtatute of limitations in trover, *vide Swayne* v. *Stephens*, *Cro. Car.* 245, 333 and 262. 1 *Jones* 252. 3 *Mod.* 111. *Mountague* v. *Sandwich*, *Fareſt.* 99.

The ſtat. of limitations pleadable to *aſſumpſit* for fees due to the plaintiff as an attorney. 1 *R. Raym.* 2, 3 *Lev.* 367.

Stat. of Limitations may be replied to a plea of ſet-off.

It was held, that the ſtatute of limitations may be replied to a plea of a ſet-off. *Trin.* 21 *Geo.* 2. *B. R. Remington* v. *Stevens*, 2 *Str.* 1271.

that the ſaid *R.* did, at ſome time within ſix years next before the day of exhibiting the bill of the ſaid *T.* undertake in manner and form as the ſaid *T.* above complains againſt him; and this he prays may be inquired of by the country.

Non aſſumpſit & non aſſumpſit infra ſex annos.

And the ſaid *Robert Perry*, by *Robert Richardſon* his attorney, comes and defends the force and injury, when, *&c.* and ſays, that he did not undertake in manner and form as the ſaid *Sarah Wheeler* above complains againſt him; and of this he puts himſelf upon the country: and the ſaid *Robert*, by leave of this court, according to the form of the ſtatute in that caſe lately made and provided, further ſays, that the ſaid *Sarah Wheeler* ought not to have or maintain her ſaid action againſt him, becauſe he ſays, that he the ſaid *Robert Perry* did not, at any time within ſix years next before the day of exhibiting the ſaid bill of the ſaid *Sarah Wheeler*, undertake in manner and form as the ſaid *Sarah Wheeler* above complains againſt him; and this he is ready to verify: Wherefore he prays judgment, if the ſaid *Sarah Wheeler* ought to have or maintain her ſaid action againſt him.

Actio non accrevit infra ſex annos. 2 Salk. 422. 1 Vent. 191. 3 Keb. 613. 1 Lev. 48. 1 Sid. 66. 1 Keb. 177. Godb. 437.

And the ſaid *William Betts*, by *Henry Hart* his attorney, comes and defends the force and injury, when, *&c.* and ſays, that the ſaid *William Dowſe* ought not to have or maintain his ſaid action againſt him, becauſe he ſaith, that the ſeveral cauſes of action in the ſaid declaration did not firſt accrue, nor did any of the ſaid cauſes of action firſt accrue within ſix years next before the exhibiting of the ſaid bill of the ſaid *William Dowſe*; and

this he is ready to verify; Wherefore he prays judgment, if the ſaid *William Dowſe* ought to have or maintain his ſaid action againſt him.

The ſtatute of uſury pleaded. Oyer. Lilly's Ent. 183.

And the ſaid *Margaret*, by *J. A.* her attorney, comes and defends the force and injury, when, *&c.* and prays oyer of the ſaid writing obligatory, and it is read to her in theſe words, *&c.* ſhe alſo prays oyer of the condition of the ſaid writing, and it is read to her in theſe words, that is to ſay, The condition of this obligation is ſuch, that if the above bounden *C. Dunſter*, *D. Wright*, and *M. Jones*, or any of them, their, or any of their heirs, executors or adminiſtrators, do well and truly pay, or cauſe to be paid unto the above named *Elizabeth Hayes*, her executors, adminiſtrators or aſſigns, the full ſum of 100 *l.* of good and lawful money of *Great Britain*, on the fifth day of *December* now next enſuing, then this obligation to be void, or elſe to remain in full force and effect; which being read and heard, the ſaid *Margaret* ſays, that ſhe ought not to be charged with the ſaid debt by virtue of the ſaid writing obligatory, becauſe ſhe ſays, that after the twenty-ninth day of *September* in the year of our lord 1714. to wit, on the fifth day of *July* in the year of our lord 1768 at the ſaid pariſh of St. *Martin in the Fields*, it was corruptly agreed between the ſaid *Elizabeth* and the ſaid *Margaret*, and one *C. Dunſter* and one *D. Wright*, that the ſaid *Elizabeth* ſhould advance and lend the ſaid *Margaret*, *C.* and *D.* the ſum of 100 *l.* and ſhould give day of payment thereof unto the fifth day of *December* next enſuing, and that the ſaid *Margaret*,

garet, *C.* and *D.* for the loan of the ſaid 100 *l.* and for giving day of payment thereof to the time aforeſaid, ſhould give and pay to the ſaid *Elizabeth* the ſum of five pounds, and five ſhillings, upon the ſaid fifth day of *December* then next enſuing, for the intereſt and profit thereof, and for giving day of payment of the ſaid one hundred pounds; which ſaid five pounds and five ſhillings exceed the rate of five pounds for the intereſt of one hundred pounds for one whole year, contrary to the form of the ſtatute in ſuch caſe made and provided; and afterwards, to wit, on the ſaid fifth day of *July* in the year and at the place in the declaration above mentioned, the ſaid *Elizabeth*, in proſecution of the ſaid corrupt agreement, advanced and lent to the ſaid *Margaret C.* and *D.* the ſaid 100 *l.* and the ſaid writing in the ſaid declaration above mentioned was by the ſaid *Margaret*, *C.* and *D.* ſealed, and as their deed delivered to the ſaid *Elizabeth*; and they the ſaid *Margaret*, *C.* and *D.* then and there, to wit, on the ſaid fifth day of *July* in the year and at the place in the ſaid declaration above mentioned, paid to the ſaid *Elizabeth* the ſaid ſum of five pounds and five ſhillings, for profit and intereſt of the ſaid one hundred pounds, and for giving day for payment thereof unto the ſaid fifth day of *December* next enſuing, in performance, and according to the form and effect of the ſaid corrupt agreement, by which the ſaid writing in the ſaid declaration above mentioned, by force of the ſaid ſtatute in ſuch caſe made and provided, is void in law;

Stat. 12 Ann. c. 16.

law; and this she is ready to verify: And therefore she prays judgment, if she ought to be charged with the said debt by virtue of the said writing, &c.

Ed. Whitaker.

Replication, that it was for a true and just debt.

And the said *Elizabeth* says, that she, by any thing by the said *Margaret* above in pleading alledged, ought not to be barred from having her said action thereupon against the said *Margaret*, because she says, that the said *Margaret* made, sealed, and as her deed delivered to the said *Elizabeth* the said writing obligatory in the said declaration mentioned, for a true and just debt due from the said *Margaret* to the said *Elizabeth*; without this, that it was corruptly agreed between the said *Elizabeth* and the said *Margaret*, and one *C. Dunster* and one *D. Wright*, in manner and form as the said *Margaret* above in pleading has alledged; and this she is ready to verify: Wherefore she prays judgment and her said debt, together with her damages by occasion of the detaining the said debt, to be adjudged to her.

Traverse.

Rejoinder.

And the said *Margaret*, as before, says that it was corruptly agreed between the said *Elizabeth* and the said *Margaret*, and one *C. Dunster* and one *D. Wright*, in manner and form as she the said *Margaret* above in pleading has alledged; and of this she puts herself upon the country; and the said *Elizabeth* likewise, &c. Therefore let a jury come thereupon before our lord the king at *Westminster*, on next after and who neither,

Issue. Venire *awarded.*

neither, &c. to take cognizance, &c. becauſe as well, &c. The ſame day is given to the parties aforeſaid at the ſame place, &c.

* *Demurrers.*

Demurrer to a declaration in debt.

And the ſaid *Edward S.* by *George Goldſmith* his attorney, comes and defends the force and injury, when, &c. and prays judgment of the ſaid declaration, becauſe he ſays, that the ſaid declaration, and the matter therein contained, are not ſufficient in law to maintain the ſaid action of the ſaid *James M.* againſt him the ſaid *Edward S.* to which ſaid declaration the ſaid *Edward S.* has no need, nor is he bound by the law of the land in any manner to anſwer; and this he is ready to verify: Wherefore for default of a ſufficient declaration in this behalf, the ſaid *Edward S.* prays judgment of the ſaid declaration, and that the ſame may be quaſhed, &c.

* A demurrer confeſſes only matter of fact, and that only when it is well pleaded; but never confeſſes matter of law. *R. Raym.* 18. *Plowd.* 85. 5 *Co.* 96.

The plaintiff declares in trover, the defendant demurs, the plaintiff demurs to the demurrer, the defendant joins in demurrer; adjudged a diſcontinuance. *R. Raym.* 20.

Covenant, plea, a releaſe and confirmation, &c. Demurrer *quia duplex et caret forma. Curia:* This is a general demurrer, for the demurrer ought to ſhew in what the duplicity conſiſts; and upon a general demurrer, duplicity is not fatal. *Paſch.* 13 *W.* 3. *B. R. Lamplugh* and *Shortridge. Com. Rep.* 115. *pl.* 78.

Joinder in demurrer. And the ſaid *James M.* ſays, that by any thing before alledged the ſaid declaration ought not to be quaſhed, becauſe he ſays, that the ſaid declaration, and the matter therein contained are ſufficient in law to maintain the ſaid action of the ſaid *James M.* againſt the ſaid *Edward S.* which ſaid declaration, and the matter therein contained, the ſaid *James M.* is ready to verify and prove, as the court, *&c.* And becauſe the ſaid *Edward S.* does not anſwer the ſaid declaration, nor has hitherto in any manner denied the ſame, the ſaid *James M.* prays judgment and his ſaid debt, together with his damages by occaſion of detaining the ſaid debt, to be adjudged to him.

Concluſion in debt.

In caſe. And his damages by occaſion of the premiſſes to be adjudged to him.

In treſpaſs. And his damages by occaſion of the ſaid treſpaſs to be adjudged to him.

Treſpaſs and aſſault. And his damages by occaſion of the ſaid treſpaſs and aſſault to be adjudged to him.

Covenant. And his damages by occaſion of the ſaid breach of covenant to be adjudged to him.

Demurrer to a declaration. And the ſaid *Nicholas*, by *Arthur Stone* his attorney, comes and defends the force and injury, when, *&c.* and ſaith, that the ſaid declaration, and the matter therein contained, are not ſufficient in law to maintain the ſaid action of the ſaid *William* and *Elizabeth* againſt the ſaid *Nicholas*, to which ſaid declaration the ſaid *Nicholas* hath no need, nor is he obliged by the law of the land to anſwer: Wherefore, for want of a ſufficient declaration in this caſe, the ſaid *Nicholas* prays judgment, and that the ſaid declaration may

be

be quaſhed; and the ſaid *Nicholas*, according to the ſtatute, ſhews the cauſes of demurrer following, to wit, that it does not appear, nor is it alledged in the ſaid declaration, whether the ſaid *James Kirwan died inteſtate*, or not;* nor is it alledged in the ſaid declaration, as it ought to be, that *adminiſtration* of the *goods* and *chattels*, which were of the ſaid *James Kirwan at the time of his death*, was committed to the ſaid *Elizabeth*, and alſo that the ſaid declaration is uncertain, and wants form.

Cauſes, not alledged that adminiſtration was granted to plaintiff.

And the ſaid *John Sandford*, by *H. G.* his attorney, comes and defends the force and injury, when, *&c.* and ſays, that the ſaid declaration, and the matter therein contained, are not ſufficient in law for the ſaid *Joſeph* to have and maintain his ſaid action againſt him the ſaid *John*; to which ſaid declaration the ſaid *John* has no need, nor is he bound by the law of the land in any manner to anſwer; and this he is ready to verify: Wherefore for want of a ſufficient declaration in this caſe the ſaid *John* prays judgment, and that the ſaid *Joſeph* may be barred from having his ſaid action againſt him the ſaid *John*, *&c.* and for cauſe of demurrer in law, the ſaid *John Sandford*, according to the form of the ſtatute, *&c.* ſhews to the court here the following cauſes, to wit, that the ſaid two ſeveral cauſes of action, that is to ſay, of treſpaſs, and of treſpaſs on the caſe, in the ſaid declaration contained and above ſhewn, do not

Demurrer in bar to a declaration. Lilly's Ent. 103.

Cauſes of demurrer, two ſeveral cauſes of action that ought not to be joined.

* Good after verdict. *Skin.* 551. *Styles* 262.

Blanks in the declaration.

not lie together, nor ought to be contained in one and the ſame declaration; and that in the ſaid declaration there are divers vacant ſpaces wanting words to ſignify and expreſs days, months, years, and other things.

Day given to the plaintiff to join in demurrer.

And upon this the ſaid *John* prays, that the ſaid *Joſeph* may join with him in demurrer; and thereupon a day is given, by the court of our ſaid lord the king now here, to the ſaid *Joſeph* before our lord the king at *Weſtminſter*, until *Thurſday* next after the octave of St. *Martin* thence next enſuing, to join with the ſaid *John* in the ſaid demurrer in law; and the ſaid *Joſeph* at that day being ſolemnly demanded came not, nor has he further proſecuted his ſaid bill againſt the ſaid *John*, but made default: It is therefore conſidered, that the ſaid *Joſeph* take nothing by his ſaid bill, but that he and his pledges of proſecuting, to wit, *John Doe* and *Richard Roe*, be in mercy; and that the ſaid *John* go thereupon without day, *&c.* And it is further conſidered by the court of our ſaid lord the king now here, that the ſaid *John* recover againſt the ſaid *Joſeph* four pounds for his coſts and charges by him about his defence in this behalf ſuſtained, adjudged to the ſaid *John* by the court of our ſaid lord the king, according to the form of the ſtatute in ſuch caſe lately made and provided, *&c.* and that the ſaid *John* have thereof execution, *&c.*

Plaintiff makes default.

Judgment.

Joinder in demurrer to a plea in bar.

And the ſaid *Joſeph* ſays, that the plea by him the ſaid *Joſeph* in manner and form above pleaded, and the matter in the ſame contained, is good and ſufficient in the law to bar the ſaid

ſaid *John* from having his ſaid action againſt him the ſaid *Joſeph*; which ſaid plea, and the matter therein contained, the ſaid *Joſeph* is ready to verify and prove as the court, *&c.* and becauſe the ſaid *John* has not anſwered the ſaid plea, nor hitherto any ways denied it, the ſaid *Joſeph* prays judgment, and that the ſaid *John* may be barred from having his ſaid action againſt him the ſaid *Joſeph*, *&c.* But becauſe the court of our ſaid lord the king now here, is not yet adviſed about giving judgment of and concerning the premiſſes, day is therefore given to the ſaid parties to come before our lord the king at *Weſtminſter*, until next after to hear judgment of and upon the ſame premiſſes, for that the court of our ſaid lord the king now here is not yet adviſed thereof.

Continuance by cur. adviſare vult.

And the ſaid *Robert Browning* ſays, that he, by any thing by the ſaid *Benjamin Suran* above by pleading alledged, ought not to be barred from having his ſaid action againſt the ſaid *Benjamin*, becauſe he ſays, that the ſaid plea by the ſaid *Benjamin* in manner and form above pleaded, and the matter therein contained, are not ſufficient in law to bar the ſaid *Robert* from having his ſaid action againſt the ſaid *Benjamin*; to which ſaid plea, in manner and form above pleaded, the ſaid *Robert* has no need, nor is he bound by the law of the land in any manner to anſwer; and this he is ready to verify: Wherefore for default of a ſufficient plea in this behalf, the ſaid *Robert* prays judgment and his debt, together with his damages by occaſion of detaining that debt, to be adjudged to him, *&c.*

Demurrer to a plea

And

Joinder. And the ſaid *Benjamin* ſays, that the ſaid plea by him the ſaid *Benjamin* in manner and form aforeſaid above pleaded, and the matter therein contained, are good and ſufficient in the law to bar the ſaid *Robert* from having his action againſt the ſaid *Benjamin*; which ſaid plea, and the matter therein contained, the ſaid *Benjamin* is ready to verify and prove, as the court, *&c.* And becauſe the ſaid *Robert* does not anſwer the ſaid plea, nor has hitherto any ways denied it, the ſaid *Benjamin*, as before, prays judgment, and that the ſaid *Robert* may be barred from having his ſaid action againſt him the ſaid *Benjamin*, *&c.* But becauſe the court of our ſaid lord the king now here is not yet adviſed about giving judgment of and concerning the premiſſes, day is therefore given to the ſaid parties to come before our lord the king at *Weſtminſter*, until next after to hear judgment of and upon the ſame premiſſes, for that the court of our ſaid lord the king now here is not yet adviſed thereof.

Continuance.

Demurrer to a replication. And the ſaid *William* ſays, that the ſaid plea, by the ſaid *John* in manner and form above by replying pleaded, and the matter therein contained, are not ſufficient in law for the ſaid *John* to maintain his ſaid action againſt the ſaid *William*; and he has no need, nor is he bound by the law of the land, in any manner to anſwer to the ſaid plea in manner and form aforeſaid pleaded; and this he is ready to verify: Wherefore for default of a ſufficient replication in this behalf, the ſaid *William*, as before, prays judgment, and that

that the ſaid *John* may be barred from having his ſaid action againſt him, &c.

And the ſaid *John* ſays, that the ſaid plea, by him the ſaid *John*, in manner and form aforeſaid above by replying pleaded, and the matter therein contained, are good and ſufficient in law to maintain the ſaid action of the ſaid *John* againſt the ſaid *William*; which ſaid plea, and the matter therein contained, the ſaid *John* is ready to verify and prove as the court, &c. And becauſe the ſaid *William* does not anſwer the ſaid replication, nor has hitherto in any manner denied the ſame, the ſaid *John*, as before, prays judgment and his ſaid debt, together with his damages by occaſion of detaining that debt, to be adjudged to him, &c. *Joinder.*

And the ſaid *William* ſays, that the ſaid plea of the ſaid *Sylas* above by rejoining pleaded, and the matter therein contained, are not ſufficient in law to bar the ſaid *William* from his ſaid avowry and cognizance, and that he has no need, nor is he bound by the law of the land to anſwer the ſaid plea in manner and form aforeſaid pleaded; and this he is ready to verify: Wherefore for default of a ſufficient plea in this behalf, the ſaid *William*, as before, prays judgment and a return of the ſaid cattle, together with his damages, coſts and charges by him about his ſuit in this behalf expended, to be adjudged to him according to the form of the ſtatute in ſuch caſe lately made and provided, &c. And for cauſe of demurrer in law to the ſaid plea, the ſaid *William*, according to the form of the ſtatute in ſuch caſe lately made and provided, *Demurrer to a rejoinder in replevin.* *Cauſe of demurrer.*

vided, ſhews to the court here the following cauſe, to wit, that the value of the land reſts in eſtimation, and the ſaid cuſtom by the ſaid *Sylas* above by pleading pretended and alledged is incertain, inſufficient, and void in law.

Joinder. And the ſaid *Sylas*, for that he has, by his ſaid plea above by rejoining pleaded, alledged ſufficient matter in law to bar the ſaid *William* from his ſaid avowry and cognizance, which he is ready to verify; which ſaid matter the ſaid *William* does not deny, nor in any manner anſwer thereto, but intirely refuſes to admit the verifying the ſame, as before, prays judgment and his damages by occaſion of the taking and unjuſtly detaining the ſaid cattle, to be adjudged to him, *&c.*

Demurrer to a ſurrejoinder on a ſcire facias. And the ſaid *Elihu Yale* ſays, that the ſaid plea by the ſaid *Ezekiel* above by ſur-rejoining pleaded, and the matter therein contained, are not ſufficient in law to intitle the ſaid *Ezekiel* to have his execution againſt the ſaid *Elihu* for the ſaid 40,000 *l.* and that he has no need, nor is he bound by the law of the land in any manner to anſwer to the ſaid plea in manner and form aforeſaid pleaded; and this he is ready to verify: Wherefore, for default of a ſufficient plea in this behalf, the ſaid *Elihu*, as before, prays judgment, and that the ſaid *Ezekiel* may be barred from having his execution againſt him the ſaid *Elihu*.

Joinder. And the ſaid *Ezekiel* ſays, that the matter aforeſaid, by him by his ſaid ſurrejoinder above alledged, is ſufficient in law for him the ſaid *Ezekiel* to have execution for the ſaid

40,000 *l.* in the ſaid writ mentioned; which ſaid matter he is ready to verify, and which ſaid matter the ſaid *Elihu Yale* has not denied, nor any ways anſwered thereto, but intirely refuſes to admit the verifying the ſame: Wherefore he prays judgment, and that he may have execution for the ſaid 40,000 *l.* in the ſaid writ mentioned.

General iſſue or general demurrer cannot be waived. See before where it is held otherwiſe.

The defendant cannot * waive the general iſſue or a general demurrer, and inſtead thereof give a ſpecial plea or ſpecial demurrer; but if a ſpecial plea or ſpecial demurrer be given in, and the book is made up and delivered to the defendant's attorney, he may ſtrike out the ſpecial plea or ſpecial demurrer, and return it with the general iſſue or general demurrer.

Special plea or ſpecial demurrer may.

To plead ſeveral matters no need of an affidavit.

An affidavit is not neceſſary in order to plead two or more matters, but the court expects to be informed what the matters be, that are deſired to be pleaded, in order to judge whether they are proper.

If

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* *Per curiam:* If a man pleads the general iſſue, and that is not entred; he may waive it, and plead ſpecially within four days; and *Sunday* ſhall not be reckoned one of the four days. But *Sunday* is reckoned one of the fifteen days upon the return of writs, *&c. Trin.* 13 *W.* 3. *B. R. Weſt* v. *Weſt*, 1 *R. Raym.* 674. 3 *Salk.* 274. *Caſes B. R.* 442. *Holt* 559.

In *Praxis Utr. Banci*, fo. 37. it is ſaid, that a defendant having pleaded to iſſue, and the plaintiff neglecting to enter the iſſue the ſame term iſſue is joined, the defendant within the firſt five days after the next term may alter his plea, and plead *de novo* any other plea what he pleaſeth.

When bound to plead an iſſuable plea, may demur to the replication.

If the defendant be bound by rule of court, or order of a judge, to plead an iſſuable plea, and take notice of trial, and accordingly he pleads an iſſuable plea, and the plaintiff replies, he may notwithſtanding demur to the replication without breach of the rule or order.

Pleading *iſſuable* within the terms of the uſual judge's order, giving time to plead, upon certain terms, whereof one is, "to plead an iſſuable plea.—" A plea (to an action upon a bail bond) of *ſtat.* 23 *Hen.* 6. *c.* 10. and that the bond was taken for eaſe and favour, *&c.* is an iſſuable plea, within ſuch order. *Bur. Rep.* 605. So is a plea of tender, but a plea in abatement is not, becauſe it tends to delay the plaintiff. *Bur. Rep.* 59.

Pleading *iſſuably*, means pleading ſuch an iſſue, as the plaintiff might go to trial upon. 2 *Bur. Rep.* 782.

What time the party has on rules given by the ſecondary.

On all ſpecial rules given by the ſecondary, as to reply, rejoin, ſurrejoin, rebut, plead in bar, join in demurrer, or to enter the iſſue or demurrer on the part of the defendant, the party who is to do the act is to be ſerved with a copy of the rule, and hath four days time, excluſive after the ſervice of a copy of ſuch rule, to reply, rejoin, *&c.* And if judgment be ſigned, or other proceedings had within that time, the ſame will be ſet aſide, and *Sunday*, or any holiday on which the court doth not ſit, not being the laſt of thoſe four days, is to be reckoned a day within thoſe rules.

Term's notice to reply, &c. if no proceedings for four terms.

If a cauſe has continued four terms without proſecution before iſſue joined, each party ſhall

ſhall have a whole term's notice to reply, rejoin, &c. unleſs the cauſe has been ſtayed by injunction or privilege.

What time plaintiff has to reply after oyer of deed mentioned in the plea. See Barnard. K. B. 113.

If the defendant in his plea makes a *profert in curiam* of any deed or writing, the plaintiff may pray oyer of ſuch deed or writing, and ſhall have a copy thereof delivered to him, paying for it 4 *d. per* ſheet, beſides the duty; and ſhall have as much time to reply after he receives, it as he had at the time of demanding ſuch oyer.

Special pleadings to be left with the clerk of the papers, who is to make and ſign copies.

Special pleadings, that ought to be put in the office of the clerk of the papers, or copies of them ought not to be delivered by one attorney to another, but muſt be left with the proper clerk of the papers, who is to make copies thereof, ſigned by him, *vide antea, fol.* . If the plaintiff's name begins with *A.* to be left with Mr. *Benton*, if with *B.* to be left with Mr. *Auſten* and ſo alternately.

Mr. *Benton.*	Mr. *Auſten.*
A.	B.
C.	D.
E.	F.
G.	H.
I.	K.
L.	M.
N.	O.
P.	Q.
R.	S.
T.	V.
W.	X. Y. Z.

When

When the clerk of the papers makes up the paper-book, he charges 8 *d. per* ſheet for the whole book, and 4 *d.* a ſheet for all pleadings ſubſequent to the declaration, beſide the king's duty.

What copies of pleadings he makes for the plaintiff, will, on being brought back, be made part of the paper-book, and allowed for.

A common joinder in demurrer need not be ſigned by counſel, but is generally drawn of courſe by the clerk of the papers.

Special plea and demurrer to be ſigned by counſel.

Every ſuch plea or demurrer is to be ſigned by counſel, and ought not to be received by the clerk of the papers, unleſs ſo ſigned; and every copy of ſuch plea or demurrer is to be ſubſcribed with the name of the counſel who ſigned the ſame. *Eaſter* 18 *Car.* 2.

In what caſes attornies may make up iſſues or demurrer-books.

Every clerk or attorney of this court may, according to the antient rules of this court, make up iſſues and demurrers in the ſeveral caſes following, *viz.*

Every iſſue that may be given on the book-ſide.

Not guilty to a new aſſignment.

The bar of *ſon frank tenement.*

Comperuit ad diem to a ſheriff's bond.

Nul tiel record to a *ſcire facias*, or action of debt on a judgment.

A general demurrer to a declaration.

In an action of covenant, where the defendant in his bar concludeth, *et de hoc ponit ſe ſuper patriam.*

Every ſpecial *non eſt factum.*

Every *ſon aſſault demeſne.*

All

All iſſues and demurrers upon every writ of error, *ſcire facias* and *audita querela*.

All repleaders, or other things formerly entered upon record.

But in no other caſes whatever.

In what caſes the plaintiff may make up the book without giving a rule to rejoin.

In all ſpecial pleadings, where the plaintiff takes iſſue upon the defendant's pleading, or traverſes the ſame, or demurs, ſo as the defendant is not let in to alledge any new matter, there the plaintiff may make up the paper-book, without giving a rule with the ſecondary to rejoin.

Book made up in term, or within four days after, to be returned in four days.

If a paper-book be made up and delivered in term-time, or within four days excluſive after term, with a rule thereon, given by the clerk of the papers for bringing of the ſame book to be inrolled, and the defendant's attorney doth not, within four days after the delivery thereof, bring back the book, and join with the plaintiff in the ſpecial iſſue or demurrer made up, or waive his ſpecial plea, and give the general iſſue or demurrer to any ſpecial iſſue tendered, and pay for entering the pleadings on his part, judgment may be ſigned and entered as if no plea had been pleaded.

If plea comes in late, and the book be made up within eight days after term, to be alſo returned within four days.

But where a plea is not put-in in time, ſo that a paper-book may be made and delivered in term, or within four days after; yet if it be made up and delivered within eight days after the term, the defendant's attorney ſhall be obliged to take it, and return it again within four days after the delivery, or elſe the plaintiff's attorney may ſign judgment.

If book not delivered within eight days after term, if in London *or* Middleſex, *or a demurrer, not to be returned till four days in next term.*

If a plea is pleaded in term, or in time after the term, and the paper-book is not made up and delivered within eight days excluſive after term, if it be an iſſue to be tried in *London* or *Middleſex*, or a demurrer, the other party is not bound to deliver back the book, but hath ſo to do at any time within the firſt four days of the next term; but if it be an iſſue to be tried at the aſſiſes, the defendant's attorney ſhall deliver back the book within four days after the delivery thereof, and pay for entering his part, and join in the ſpecial iſſue, or give the general iſſue, and take notice of trial, or elſe the plaintiff's attorney may ſign judgment by default, as if the defendant had not pleaded at all.

If to be tried at the aſſiſes, to be returned in four days.

If plaintiff's attorney accept the book after the 4 days, he cannot ſign judgment.

But in all caſes, if the plaintiff's attorney accept the book after the limited time, he cannot ſign judgment.

Where the 4 days are excluſive, where incluſive.

If the paper-book be of an iſſue in fact, the four days for keeping the paper book are to be reckoned excluſive of the day of the delivery; if of a demurrer, an iſſue in law, the four days are incluſive.

Notice of trial on ſpecial iſſue to ſerve for general iſſue.

Upon delivery of any paper book wherein an iſſue is joined, and notice of trial given on the back of the book, if the ſame be afterwards waived, and the general iſſue given, the notice which was given for the trial of the ſpecial iſſue ſhall ſerve for notice of the general iſſue.

Where

Where the plaintiff upon any pleading of the defendant tenders an iſſue, and the book is made up and delivered with notice of trial, and the defendant ſtrikes out the *ſimiliter*, and returns the book with a demurrer, if judgment on the demurrer be given for the plaintiff, the ſame notice which was given for the trial of the iſſue, ſhall ſerve for executing the writ of inquiry. *Hil.* 8 *Geo.* 1. But then the plaintiff ought to give notice of the hour and place of executing the inquiry.

Notice of trial to ſerve for enquiry when book returned with a demurrer.

In all paper-books to be made up by the clerk of the paper, he ought to ſubſcribe the name of the counſel who ſigned the pleadings, as well on the part of the plaintiff as of the defendant; and in all books to be delivered to the judges, the names of the counſel who ſigned the pleadings ought alſo to be ſubſcribed. *Eaſter* 18 *Car.* 2.

In all paper-books the names of the counſel to be inſerted.

The books ought to be delivered to the judges four days (but for a long time the practice has been to deliver them only two days) before the day appointed for the argument. *Eaſter* 2 *Jac.* 2.

Books to be delivered to the judges 2 days before the argument.

If one of the parties delivers all the paper-books, on the other party's neglecting to deliver any, the party neglecting will not be heard when the cauſe comes on to be argued.

Party who does not deliver books, not to be heard.

The books for the chief juſtice and ſenior puiſne judge ought to be delivered by the plaintiff, and thoſe for the two other judges by the defendant.

How the books are to be delivered.

Causes standing over are to be entered with the clerk of the papers 7 days after term.

Every cauſe which ſtands over for the reſolution of the court, or to be ſpoke to further in another term, ought to be entered with the clerk of the papers within ſeven days after the term, that a paper of them may be prepared in time for the judges, and in neglect of ſo doing, not to be entered without leave of the court. *Eaſter* 1658. *Antea, fol.*

This rule has been diſuſed of late years.

Cauſes to be ſet down at leaſt four days excluſive of the day of argument, and notice to be given to the other ſide.

Whereas divers cauſes ſet down in the book kept by the clerk of the papers of this court to be argued by counſel, are frequently adjourned from time to time at the inſtance of ſome or one of the parties in ſuch cauſes, or their attorney or agent, without any previous application or notice to the court, or by conſent at the time when they ſhould come on to be argued, which occaſions a great expence, and grievous delay to the parties, and is likewiſe an intolerable obſtruction to the buſineſs of the court: For remedy whereof for the future, it is ordered, that from and after the laſt day of this term all ſpecial cauſes, to be ſet down by the clerk of the papers of this court to be argued, ſhall be entered at leaſt four days excluſive of the day of argument, of which notice ſhall forthwith be given to the attorney or agent on the other ſide; and that all ſuch cauſes ſhall be argued in the order and courſe the ſame ſtand entered, and ſhall not be adjourned to any future day by conſent or otherwiſe, unleſs the court ſhall, for reaſonable cauſe verified by affidavit, upon application to be made by either of the ſaid parties, their attorney or agent (at leaſt two days

Not to be adjourned unleſs, &c.

days before the day of argument) otherwiſe order. *And it is further ordered*, that all ſuch cauſes, remaining undetermined at the end of any term, ſhall, without any new entry, be continued in the book kept by the clerk of the papers, to come on the next term in the order and courſe the ſame ſtand. *Mich.* 30 *Geo.* 2.

Cauſes remaining at the end of a term are to come on next term without any new entry.

If the plaintiff demurs, or takes iſſue on the defendant's plea, rejoinder or rebutter, and the defendant in caſe of a demurrer joins therein, and plaintiff will not make up the book, and enter it on record, the defendant may make up the book, and enter it if he pleaſes, on a rule given the ſecondary for that purpoſe. See rule *Eaſter* 11 *W.* 3.

If plaintiff demurs, and defendant joins, and plaintiff does not make up the paper-book, the defendant may on a rule given.

When the book is made up by the defendant, he muſt deliver it to the plaintiff, and pay him for the entry of his the defendant's pleadings, becauſe the plaintiff may perhaps enter the iſſue, as he has a right to do at any time before the expiration of the rule, to enter it on the part of the defendant, which rule ought to be ſerved on the plaintiff at the ſame time the book is delivered to him. If the plaintiff does not enter the iſſue, the defendant may at the expiration of the rule, and give notice of trial by proviſo; but then the plaintiff ought to return to the defendant the money he received from him for the entry on his part.

The method of proceeding when made up by defendant.

Tueſdays and *Fridays* in every term are called ſpecial paper-days, becauſe the court goes into the paper before they enter upon motions.

Paper-days.

On ſetting down a cauſe for argument, the term and number of the roll to be inſerted. Andrews 31.

According to the antient uſage and practice of this court, no cauſe is to be put in the paper of cauſes for argument without inſerting the term and number of the roll on which the pleadings are entered; and therefore all attornies are to produce to the clerk of the papers at the time of their ſetting down their cauſes, the term and number of the roll accordingly.

All cauſes ſtanding for argument in the ſpecial paper, to come on in the ſame order in which they are there entered, and ſo to continue to ſtand, till they ſhall be argued; and none to be put off, without a previous ſpecial application to the court. *Bur. Rep.* 52.

Of making up iſſues.

Of what term an iſſue is to be made up.

THE general practice is to make up the iſſue, and enter it on a roll of that term in which the plea was delivered, which roll is therefore called the plea-roll; indeed it has been * held, that a plea delivered in one term may

* Debt on a bond, plea as to part, payment, demurrer. *Curia:* This being a plea only to part, there is a diſcontinuance as to the reſidue. But the plea appearing by the record to be of the preſent *Hilary* term, it was held that the plaintiff might ſtill take judgment for the reſidue by *nil dicit*; tho' it was objected that the plea was actually delivered in *Michaelmas* term, and ought to be ſo entered; the clerks certifying the court, that though the plea was delivered in *Michaelmas* term, yet it being only a plea to enter, it might be entered as of *Hilary* term, and ſo trick for trick. *Hil.* 3 *Ann. B. R. Market* and *Johnſon, Salk.* 180. 1 *R. Raym.* 1121.

may be entered as of the ſubſequent term with an imparlance; but there are many caſes in which this may not be done, particularly in caſes of pleas in abatement where it would vitiate the plea. I have known ſome attornies go ſo far as to make up the iſſue of a term ſubſequent to all the pleadings, with a memorandum of a * bill of two or three terms after the term in which the declaration was delivered; but as this is not warranted by the pleadings, may after deprive the defendant of ſome part of his defence, and is only to avoid paying *poſt terminum*. I think it ought not to be followed or encouraged.

The memorandum.

In all caſes where your proceedings are by bill, you begin with the memorandum, which varies in four caſes. 1. Where the bill or declaration is of the ſame term with the iſſue. 2. Where it is of a precedent term. 3. Where it is of above 4 terms paſt. 4. Where it is of a particular day in a term, and that is where the cauſe of action aroſe in that term, and then you make the memorandum of a day in that term, ſubſequent to the day on which the cauſe of action accrued.

* Iſſue entered on a roll *Eaſter* term, with a memorandum of a bill of *Hilary* term, trial and verdict *pro Q.* Rule for a new trial on payment of coſts, and bringing the damages found into court; the plaintiff made up a new plea roll of *Michaelmas* term, with a memorandum of a bill of *Trinity* term, trial and verdict *pro Q.* ſet aſide for irregularity. This don't appear to be the ſame cauſe, and the plaintiff hath not purſued the rule which was to try the ſame iſſue. *Carth.* 198.

Imparlance.

When the defendant pleads in or of the ſame term in which the declaration was delivered, there is no imparlance to be entered; but if the defendant has 'till the next term to plead, then you make up the iſſue with an imparlance, unleſs it be a plea in abatement pleaded within the firſt four days of the term, as of the precedent term. And if the plea be of two or three terms ſubſequent to the declaration, you enter but * one imparlance; taking no notice of the intervening terms, as if the declaration be of *Hilary* term, and the plea of *Michaelmas* term following, you enter it upon a roll of *Michaelmas* term, and begin your memorandum thus: *Be it remembered, that in the term of* St. Hilary *laſt paſt*, &c. then after the end of the declaration you go on and ſay, *And* now at this day, that is to ſay, on *Monday* next after three weeks from the day of St. *Michael* in this ſame term, to which day, *&c.* There are alſo † ſpecial imparlances uſed in caſes of pleas in

Where the plea is of two or three terms ſubſequent to the declaration.

Special imparlances.

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* Demurrer to a declaration; exception, that the action was diſcontinued, becauſe the declaration was of *Michaelmas* term, and the plea-roll of *Eaſter* term; and there is no continuance from *Michaelmas* term to *Hilary* term, and from thence to *Eaſter* term. *Sed non allocatur*; becauſe by the courſe of the *King's Bench* they never enter continuances until the plea comes in, though the declaration was delivered four terms before. *Trin. 2 Ann. B. R. Curlewis* v. *Dudley*, 2 *R. Raym.* 872. *Salk.* 179.

† In an action againſt *H.* he pleaded to the juriſdiction of the court, and the declaration being not delivered four days before the end of the term, pleaded it,

as

in abatement, and many precedents of imparlances to * pleas in abatement; for both which kinds of imparlances ſee the *ſecond volume.* *Imparlances to pleas.*

Of Michaelmas *term in the ſeventh year of the reign of our ſovereign lord* George *the third, now king of* Great Britain, *&c.*

Middleſex, to wit, BE it remembered, that heretofore, that is to ſay, in the term of the Holy *Trinity* laſt paſt, before our lord the king at *Weſtminſter*, came *A. B.* by *R. A.* his attorney, and brought here into the court of our ſaid lord the king then there, his certain bill againſt *C. D.* being in the cuſtody *Memorandum of a bill of the precedent term.*

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as he might by the courſe of the court, within the firſt four days in the ſubſequent term; and the clerk, to avoid the trouble of making up a poſt roll, entered it with a ſpecial imparlance as of the ſubſequent term, which ſpoiled the plea: And the clerks were ordered to make up poſt rolls, and not to uſe theſe ſpecial imparlances, which *Holt* ch. j. ſaid were crept in of late, and were not known formerly. *Mich.* 10 *W.* 3. *B. R. Anonymus, Salk.* 367. See 2 *R. Raym.* 1208.

* It was reſolved that the courſe of the *King's Bench* is, that although the plaintiff after a bar pleaded have day to reply two or three terms, no mention ſhall be made in the roll of any imparlance or continuance. But otherwiſe it is of a bar there, for that ſhall contain the imparlance or continuance, and is in the above form; but no ſuch entry is made upon any replication, rejoinder, *&c.* Wherefore they ſhall be intended, when they are generally entered of record, that they were made in the ſame term in which the the bar, *&c.* was pleaded; and by conſequence the plaintiff may take advantage of a condition contained in a deed pleaded by the defendant, with a *profert in curia* in a precedent term. *Wymarke's* caſe, 5 *Rep.* 75.

cuſtody of the marſhal, *&c.* of a † plea of treſpaſs upon the caſe, (treſpaſs and aſſault, or debt, *as the action is*;) And there are pledges for proſecuting, namely *John Doe* and *Richard Roe*, which ſaid bill followeth in theſe words, to wit, *Middleſex, to wit, A. B.* complains of *C. D.* being in the cuſtody, *&c.* (ſo ſet forth the declaration *in hæc verba* to) And thereof he brings ſuit, *&c.*

[Then on a new line the imparlance.]

Imparlance. And now at this day, that is to ſay, on *Monday* next after three weeks from the day of St. *Michael*, (the firſt day of the term in which the iſſue is joined) in the ſame term, to which day the aforeſaid *C. D.* had leave to imparl to the ſaid bill, and then to anſwer, *&c.* before our lord the king at *Weſtminſter*, comes as well the ſaid *A. B.* by his attorney aforeſaid, as the ſaid *C. D.* by *A. S.* his attorney, and the ſaid *C. D.* defends the wrong and injury, when, *&c.* and ſays, *Replication.* that (*here inſert the plea to*) and of this he puts himſelf upon the country; and the ſaid *A. B.* doth the like. Therefore let a jury come thereupon before our lord the king at *Weſtminſter* on next after (ſome day *Award of venire.*

† The memorandum was *de placit. debiti.* The declaration was of a plea of annuity. Amended, being the miſtake of the clerk. *Carth.* 354. Though the words *de placit. &c.* are uſually inſerted, yet, as the bill itſelf is afterwards ſet forth *in hæc verba*, they are not abſolutely neceſſary; as was determined in *C. B.* where, in proceedings by bill, the like memorandum is uſed. *Trin.* 7, 8 *G.* 2. *Adkin* v. *Worthington, un' &c.* And in *B. R.* on a writ of error from *C. B. Mich.* 11 *G.* 2. *Gooſtrey* v. *Reynolds, Andrews* 23.

day of the term in which the iſſue is joined, and before the day of trial; if a country cauſe, the laſt day of that term) who are in no ways of kin either to the ſaid *A. B.* or to the aforeſaid *C. D.* to recognize upon their oath the whole truth of the premiſſes; becauſe as well the ſaid *C. D.* as the ſaid *A. B.* have put themſelves upon that jury. The ſame day is given to the parties aforeſaid, at the ſame place.

Middleſex. BE it remembered, that on *Monday* next after three weeks from the day of St. *Michael*, (the firſt day of the term) in this ſame term, before our lord the king at *Weſtminſter*, *A. B.* comes by *R. A.* his attorney, and brings now here into the court of our ſaid lord the king there, his certain bill againſt *C. D.* being in the cuſtody, (*as in the other.*) *Memorandum of a bill of the ſame term.*

There is no imparlance in this caſe, but after your declaration you enter the plea with a new line thus:

And the ſaid *C. D.* by *R. R.* his attorney, comes and defends the force and injury, when, *&c.* and ſays, *&c. as before.*

If the declaration be of above four terms ſtanding, you ſay, Be it remembered, that heretofore, that is to ſay, in the term of St. *Hilary* in the ſeventh year of the reign of our ſovereign lord *George* the third, now king of *Great Britain*, *&c.* before our ſaid lord the king at *Weſtminſter*, came *A. B.* by *R. A.* his attorney, *&c.* *Memorandum of a bill of above four terms paſt.*

In this caſe there is an imparlance, *as before.*

Middleſex,

Memorandum of a bill of a particular day in the term.

Middleſex, to wit. BE it remembered, that on *Tueſday* next after fifteen days from the day of St. *Martin* (a day after the cauſe of action accrued) in this ſame term, or in *Michaelmas* term laſt paſt, as the caſe ſhall be. *Vide antea, fol.*

Eight days notice of trial and inquiry ſufficient.

Eight days excluſive is ſufficient notice of trial, and of executing a writ of inquiry in all caſes whatſoever, excepting cauſes in *London* and *Middleſex*, where the defendant lives * forty computed miles and upwards from *London*, when fourteen days notice muſt be given; and excepting cauſes wherein no proceedings have been had for four terms after iſſue joined; in which caſe a term's notice muſt be given, and ſo likewiſe when by proviſo, unleſs the cauſe has been ſtayed by injunction or privilege.

* *computed, not poſt miles.* 2 Str. 954, 1216. 2 Barnard. K. B. 331.

Sunday *one of the days.*

Sunday is to be accounted a day in theſe notices, ſo it be not the day on which the notice was given.

Notices and countermands to be in writing.

Every notice of trial, or of executing a writ of inquiry, and all countermands ought to be in writing.

Notice of trial is generally given to the defendant's attorney on the back of the iſſue, in this manner.

Mr.

Mr. B.

Take notice of trial in this cauſe for the laſt ſitting in this preſent Michaelmas *term at* Guildhall, London. *Notice of trial.*

Your humble ſervant,

10th Nov. 1768. R. R.
attorney for the plaintiff.

No indictment, information or cauſe whatſoever, ſhall be tried at *niſi prius* before any judge or juſtice of aſſiſe, or *niſi prius*, or at the ſittings in *London* or *Weſtminſter*, where the defendant or defendants reſide above 40 miles from the ſaid cities reſpectively, unleſs notice of trial in writing has been given at leaſt ten days before ſuch intended trial. *Stat.* 14 *Geo.* 2. *c.* 17. §. 4. *Ten days notice of trial where defendant lives above* 40 *miles from* London.

In caſe any party or parties ſhall have given ſuch notice of trial, as aforeſaid, and ſhall not afterwards duly countermand the ſame in writing, at leaſt ſix days before ſuch intended trial, every ſuch party ſhall be obliged to pay unto the party or parties, to whom ſuch notice of trial ſhall have been given, as aforeſaid, the like coſts and charges as if ſuch notice of trial had not been countermanded. *Same ſtat.* §. 5. *Six days countermand of ſuch notice.*

No record of *niſi prius* ſhall be ſealed or paſſed at the *niſi prius* office by the *cuſtos brevium* of this court, or any clerk of the office, before the iſſue or part of it be fairly entered on record, and ſuch entry and the record of *Iſſue to be entered before record of* niſi prius *engroſs'd.*

niſi

nisi prius be first signed by the secondary of the court. *Trin.* 1 *Jac.* 2. *Mich.* 5 *Annæ.*

As to the manner of entering issues on record, see hereafter.

Manner of ingrossing the record of nisi prius.

The *nisi prius* record is to be ingrossed on a press of parchment, stamped with a double half-crown stamp.

For your direction herein, I shall give you the following precedent prepared at the *nisi prius* office.

Pleas before our lord the king at Westminster *of the term of in the year of the reign of our sovereign lord* George *the third, by the grace of God, of* Great Britain, France, *and* Ireland *king, defender of the faith, and in the year of our Lord* 176 . *Roll*

Memorandum of a former term.

Middlesex, BE it remembered, (*as before, to wit. fol.* , to .) entering the whole issue *verbatim*, concluding with these words, "The same day is given to the "parties aforesaid at the same place;" and then enter another *placita* in the following manner.

Pleas before our lord the king at Weſtminſter *of the term of in the year of the reign of our ſovereign lord* George *the third, by the grace of God, of* Great Britain, France *and* Ireland *king, defender of the faith, and in the year of our Lord* 176 .

Middleſex, to wit, THE jury between *A. B.* plaintiff, by his attorney, and *C. D.* defendant, of a plea of treſpaſs upon the caſe, is reſpited before our lord the king at *Weſtminſter* to (the next return-day after the trial; if in the country, make the firſt day in the next term the day in bank) unleſs the king's right truſty and well beloved *William* Lord *Mansfield*, his majeſty's chief juſtice aſſigned to hold pleas before the king himſelf, ſhall firſt come on (the day of trial, if after term the firſt day of the ſittings) at *Weſtminſter Hall* in the ſaid county of *Middleſex*, according to the form of the ſtatute in ſuch caſe made and provided, for default of the jurors, becauſe none of them did appear; therefore let the ſheriff have the bodies of the ſaid jurors to make the ſaid jury between the parties aforeſaid of the plea aforeſaid accordingly. The ſame day is given to the parties aforeſaid at the ſame place. Jurata.

If the plaintiff and defendant have any addition, add it to the *jurata*.

If in *London*, ſay, at the *Guildhall* of the city of *London* aforeſaid.

If for the aſſiſes, ſay, Unleſs his majeſty's juſtices aſſigned to take the aſſiſes for the county

county aforeſaid ſhall come firſt on (the firſt day of the aſſiſes) at (the place where the aſſiſes are held) in the ſaid county. And at the end of the *jurata* add,

Le ſciendum. And be it known, that the king's writ in this caſe upon record was delivered to the under-ſheriff of the county aforeſaid on (the laſt day of the term) in this ſame term before our lord the king at *Weſtminſter* to be executed according to law at his peril.

Of ſealing the record. The record being ready to be ſealed, you carry it to the *niſi prius* office to be ſealed, where you pay 7 *s.* 6 *d.* for the firſt eight ſheets, and 7 *s.* for every eight ſheets after, and 6 *d.* to the ſealer.

Record for aſſiſes not to be ſealed after the end of three weeks after the term. By a rule of court made in *Trinity* term 31 *Car.* 2. no record of *niſi prius* for trial of any iſſue at the aſſiſes, ſhall be ſealed after the end of three weeks after any iſſuable term; but the practice is at preſent altered; for by a judge's order, for which you pay 2 *s.* to the officer, you may have your record ſealed at any time before the aſſiſes *.

Practice altered.

The

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* In the pleading and joining of the iſſue the defendant's chriſtian name was miſtaken; but the court would amend that, it being rightly named before in the record. 1 *Vent.* 25.

Motion to amend the *diſtringas* and *jurata* in the *niſi prius* record by the plea-roll, the day of *niſi prius* was after the day in bank. The verdict which was for the plaintiff was ſet aſide, for this is not amendable; and if ſo the judge had no authority to try the cauſe. *Mich.* 11 *W.* 3. *B. R. Child* v. *Harvey*, *Carth.* 506. 1 *R. Raym.* 511. *Salk.* 48. *Sed vide ſtat.* 5 *Geo.* 1. *c.* 13.

The form of the venire.

GEORGE the third, by the grace of God of *Great Britain, France* and *Ireland*, king, defender of the faith, *&c.* To the ſheriff of *Middleſex* greeting: We command you, that you cauſe to come before us at *Weſtminſter*, on next after (ſome day of the term in which the iſſue was joined, and before the day of trial; if a country cauſe the laſt day, of the term) twelve † free and lawful men of the ‖ body of your county, [If it be an action on a penal ſtatute, inſtead of the body of your county, ſay, Of the neighbourhood of *L.* (the place where the action is laid in the declaration) in your county] each of whom has ten pounds by the year of lands, tenements or rents, at the leaſt, by whom the truth of the matter may be the better known, and who are in no wiſe of kin either to *A. B.* the plaintiff, or to *C. D.* defendant, to make a certain jury of the country between the parties aforeſaid, of a plea of treſpaſs on the caſe, (as the action is) becauſe as well the ſaid *C. D.* as

Venire. Stat. 4 W. & M. c. 24. §. 15.

R

† *Raym.* 417. 1 *Keb.* 563. *i. e.* Freeholders. 2 *Inſt.* 27. *Cro. Eliz.* 618.

‖ Every *venire facias* for the trial of any iſſue in any action or ſuit in any of her majeſty's courts of record at *Weſtminſter*, ſhall be awarded of the body of the proper county where ſuch iſſue is triable. *Stat.* 4 & 5 *Ann.* c. 16. §. 7.

Provided that this ſhall not extend to any action upon any penal ſtatute, *&c.* *Same ſtat.* §. 7.

as the ſaid *A. B.* between whom the matter in variance is, have put themſelves upon that jury; and have there then the names of the jurors and this writ. Witneſs *William* Lord *Mansfield* at *Weſtminſter*, the 23d day of *January* in the ——— year of our reign.

Lee.

This writ is not ſigned, but only ſealed, for which you pay 7 *d.*

Venire *in ejectment by original.*

GEORGE the third, *&c.* To the ſheriff of *Lancaſhire* greeting: We command you, that you cauſe to come before us whereſoever we ſhall then be in *England*, on the octave of the purification of the bleſſed virgin *Mary*, twelve free and lawful men of your county, each of whom hath ten pounds of lands, tenements or rents by the year at the leaſt, by whom the truth of the matter may be the better known, and who neither to *Thomas Neale* the plaintiff, nor to *John Wilding*, *Thomas Harriſon*, *&c.* defendants, are any ways related, to make a certain jury of the country between the parties aforeſaid, of a plea of treſpaſs and ejectment; becauſe as well the aforeſaid *Thomas Neale*, as the aforeſaid *John Wilding*, *Thomas Harriſon*, *&c.* between whom the matter is in diſpute, have put themſelves upon that jury; and have you then there the names of the jurors and this writ. Witneſs *William* Lord *Mansfield* at *Weſtminſter*, the twenty-third day of *January* in the ——— year of our reign.

Lee.

Information againſt one of the ſheriffs of the city of *Cheſter*; ſuggeſtion that the defendant is one of the ſheriffs, and *venire* awarded to the other, and adjudged to be well awarded. *Carth.* 214. 4 *Mod.* 65. *Skin.* 104.

One of the ſheriffs a defendant, venire *awarded to the other.*

If the plaintiff ſhould not proceed to trial within the time he ought by the courſe of the court, the defendant having given a rule for the plaintiff to enter his iſſue, (if not already entered) and the iſſue being entered, may have a *venire* by proviſo, and proceed to trial. In the *venire* by proviſo, after the words, "have put themſelves upon that "jury," add, "Provided always, that if "two writs ſhall thereupon come to you, "you ſhall execute and return only one of "them; and have, *&c.*"

Of trials by proviſo.

But in *Lilly's Entries*, *fol.* 676. it is ſaid, theſe words are not to be put in the *venire*, but in the *diſtringas* after *plur. defalt.* Vide ſtat. 7 & 8 W. 3. c. 32.

If the plaintiff enter not his iſſue within the time allowed by the rule, he ſhall be nonſuited, and the defendant have his coſts.

Plaintiff on rule muſt enter his iſſue, or be nonſuited.

If the action be laid in *London* or *Middleſex*, the defendant ought not to give a rule for the plaintiff to enter his iſſue the ſame term in which the iſſue is joined, unleſs notice of trial hath been given; and in a country cauſe the plaintiff is no ways bound to enter his iſſue the ſame term. *Praxis U. B.* 24.

No rule to enter iſſue the ſame term, unleſs notice of trial given.

The plaintiff muſt enter his iſſue if the action is in *London* or *Middleſex*, and bring the record in the office within four days after no-

What time the plaintiff has to enter his iſſue.

tice of the rule; if in the country, before the continuance-day of that term, or a *non-proſs* may be ſigned and entered.

When a trial by proviſo may be had.

No trial can be had by proviſo in *London* or *Middleſex* 'till default made by the plaintiff after the iſſue is entered on record, nor in country cauſes 'till the plaintiff hath made default in trying his cauſe the next aſſiſes after the iſſue is entered on record; and in neither caſe 'till a rule for a trial by proviſo is entered, *Praxis U. B.* 24.

Notice of ſuch trial to be given.

Notice of trial muſt be given by the defendant to the plaintiff in all cauſes by proviſo. *Eaſter* 1651.

Coſts for not going to trial by proviſo.

If the defendant does not proceed to trial by proviſo, according to his notice, or countermand in time, the plaintiff ſhall have his coſts to be taxed.

Both plaintiff and defendant may carry down the record.

Both plaintiff and defendant may carry down the record at the ſame time, but the trial ſhall be on the plaintiff's record, if he enters it with the marſhal; but if he refuſes or omits to enter it, the defendant may proceed on his record.

If plaintiff neglects to proceed to trial, court on motion to give judgment as in caſe of nonſuit.

But now the practice of trials by proviſo ſeems to be quite gone; for where any iſſue ſhall be joined in any action or ſuit at law, and the plaintiff or plaintiffs in any ſuch action or ſuit have or hath neglected, or ſhall neglect to bring ſuch iſſue on to be tried according to the courſe and practice of the court, the judges, at any time after ſuch neglect, upon motion made in open court, (*due notice having been given thereof*) may give the like judgment for the defendant or defendants in every ſuch action or ſuit, as in caſes of non-

ſuit

ſuit, unleſs the judges ſhall, upon juſt cauſe and reaſonable terms, allow any further time or times for the trial of ſuch iſſue; and if the plaintiff or plaintiffs ſhall neglect to try ſuch iſſue within the time or times ſo allowed, then, and in every ſuch caſe, the judges ſhall proceed to give ſuch judgment, as aforeſaid. *Stat.* 14 *Geo.* 2. *c.* 17. §. 1.

Unleſs on juſt cauſe ſhall allow further time.

On ſecond neglect, judgment as before.

All judgments given by virtue of this act, ſhall be of the like force and effect as judgments upon nonſuit, and of no other force or effect. *Same ſtat.* §. 2.

Such judgment to be of like effect as judgment on nonſuit.

Provided alſo, that the defendant or defendants ſhall, upon ſuch judgment, be awarded his, her or their coſts, in any action or ſuit where he, ſhe or they would, upon nonſuit, be intitled to the ſame, and in no other action or ſuit whatſoever. *Same ſtat.* §. 3.

Defendant to have his coſts, where upon nonſuit he would be intitled to the ſame.

In order to apply for judgment upon this ſtatute as in caſes of nonſuit, you muſt give notice of the motion, and have an affidavit of the ſtate of the proceedings and of the plaintiff's default in proceeding to trial, and alſo of the ſervice of the notice of the motion; upon reading of which affidavit and of the entry of the iſſue on record, (which you muſt have brought into court for that purpoſe) the court will make a rule for the plaintiff to ſhew cauſe why the like judgment ſhould not be given for the defendant as in caſes of nonſuit.

Of proceeding in order to obtain judgment as in caſes of nonſuit.

In an action againſt two, judgment againſt one by default, rule for judgment for the other, as in caſe of a nonſuit, purſuant to the above ſtatute, yet this defendant cannot have his coſts taxed as in caſe of a nonſuit; be-

cauſe the caſe of a nonſuit does not here exiſt; for if the plaintiff be nonſuited, he muſt be out of court as againſt both defendants, whereas he hath obtained judgment againſt one of them. *Bur. Rep.* 359.

When the *venire* is returned, you make out a *diſtringas juratores*.

Diſtringas.

GEORGE the third, by the grace of God, of *Great Britain*, *France* and *Ireland* king, defender of the faith, *&c.* To the ſheriff of *Middleſex* greeting: We command you, that you diſtrain the ſeveral perſons named in the panel annexed to this writ, (annex a panel with the ſame names as returned in the panel to the *venire facias*, with their additions and places of abode; but in caſes of trial at bar, or by a ſpecial jury, the names of the jurors muſt be inſerted as in the next following precedent; and in trials at bar the *niſi prius* clauſe muſt be omitted) the jury ſummoned in our court before us, between *A. B.* plaintiff, and *C. D.* by all their lands and chattels in your bailiwic, ſo that neither they, nor any one by them, lay their hands on them until you ſhall have further command therein from us, and that you anſwer us of the iſſues thereof, ſo that you may have their bodies before us at *Weſtminſter*, on next after (the firſt return-day after the day of trial) or before our right truſty and well-beloved *William* Lord *Mansfield*, our chief juſtice, aſſigned to hold pleas in our court before us, if he ſhall firſt come, on (the day of trial, if after term the firſt day of the ſittings) at *Weſtminſter Hall*

Stat. 3 Geo. 2. c. 25. §. 8. 6 Geo. 2. c. 37. 24 Geo. 2. c. 18.

in the county of *Middleſex* aforeſaid, according to the form of the ſtatute in ſuch caſe made and provided; to make a certain jury between the ſaid parties of a plea of * debt, (as the action is) and to hear their judgment of many defaults; and have there then the names of that jury and this writ. Witneſs *William* Lord *Mansfield* at *Weſtminſter*, the day of (the return of the *venire*) in the year of our reign.

Lee.

Stat. 13 E. 1. c. 30. 14 E. 3. ſt. 1. c. 16. 42 E. 3. c. 11.

If in *London* it muſt be thus: At the *Guildhall* of the city of *London* aforeſaid.

London.

If at the aſſiſes thus: Or before our juſtices aſſigned to take the aſſiſes in your county, if they ſhall firſt come on (the firſt day of the aſſiſes) at (the place where the aſſiſes are held) in your county, according to, *&c.*

Aſſiſes.

This writ is only ſealed, for which you pay 7 *d.* and to the ſheriff, if in *Middleſex*, for the return 12 *s.*

GEORGE the third, *&c.* To the ſheriff of *Lancaſhire* greeting: We command you, that you diſtrain Sir *Darcy Lever* of *Aterington*, Knt. *Miles Sandys* of *Hawkeſhead*, Eſq; *&c.* being the jurors ſummoned in our court

Diſtringas jur. *in ejectment in* B. R. *by original for a trial at bar.*

R 4

* *Diſtringas de placito* with a blank, omitting *debiti*. *Per Curiam*: It is amendable. *Paſ.* 4 *Ann.* Bullock v. *Parſons*, 2 *R. Raym.* 1143. *Salk.* 454. vide *Hob.* 246. 1 *Brownl.* 232. 1 *D. A.* 341. *p.* 6. *Cro. Jac.* 528.

court before us at *Weſtminſter*, between *Thomas Neale*, plaintiff, and *John Wilding*, *Thomas Harriſon*, *&c.* defendants, by all their lands and chattels in your bailiwic; ſo that neither they, nor any one of them, intermeddle therewith until you ſhall have another precept from us, and that you anſwer to us out of the iſſues of the ſame, ſo that you have their bodies before us on *Saturday* next after three weeks from the day of *Eaſter*, whereſoever we ſhall then be in *England*, to make a certain jury of the country between the parties aforeſaid of a plea of treſpaſs and ejectment, and to hear their judgment thereupon of many defaults; and have you then there the names of that jury and this writ. Witneſs *William* Lord *Mansfield*, at *Weſtminſter*, the twelfth day of *February* in the —— year of our reign.

Cauſe tried that day.

Lee.

Of granting a view.

Where it ſhall appear to the court, that it will be neceſſary that the jurors ſhould have the view of the meſuages, lands, or place in queſtion, in order to their better underſtanding the evidence, the court may order a ſpecial writ of *diſtringas* to iſſue, by which the ſheriff ſhall be commanded to have ſix out of the firſt twelve of the jurors named in ſuch writ, or ſome greater number of them, at the place in queſtion, ſome convenient time before the trial; who then and there ſhall have the matters in queſtion ſhewn to them by two perſons in the writ named to be appointed by the court; and the ſheriff ſhall by ſpecial return certify, that a view hath been

been had according to the command of the writ. *Stat.* 4 & 5 *Annæ*, *c.* 16. §. 8.

Where a view ſhall be allowed in any caſe, ſix of the jurors named in the panel, or more, (who ſhall be mutually conſented to by the parties on both ſides, or if they cannot agree, ſhall be named by the proper officer of the court, or if need be, by a judge, where the cauſe is depending, or by the judge before whom the cauſe ſhall be brought on to trial) ſhall have the view, and ſhall be the firſt ſworn, or ſuch of them as appear on the jury to try the cauſe, before any drawing (by ballot) and ſo many only ſhall be drawn to be added to the viewers who appear, as ſhall make up the number of twelve. *Stat.* 3 *Geo.* 2. *c.* 25. §. 14. Made perpetual by *Stat.* 6 *Geo.* 2. *c.* 37.

As the having a view was not, by either of theſe ſtatutes, made a matter of courſe, though ſuch a practice had prevailed, and had been abuſed to the purpoſes of delay, the court thought it their duty to take care, that their ordering a view ſhould not obſtruct juſtice, and prevent the cauſe from being tried; and they reſolved not to order one any more, without a full examination into the propriety and neceſſity of it; unleſs the party praying it would come into ſuch terms as might prevent an unfair uſe being made of it; for all the judges of this court were clearly of opinion, that the act of parliament meant that a view ſhould not be granted, unleſs the court was ſatisfied that it was proper and neceſſary: and they thought it better that a cauſe ſhould be tried upon a view had by any ſix, or by fewer

fewer than ſix, or even without any view, than be delayed for a great length of time. *Bur. Rep.* 252.

The rule that was made in the firſt inſtance that happened, the expedient was propoſed by the court, and was received with general approbation, as is above mentioned, was drawn up in the following words.

29th *Jan.* 1757. "*Saturday* next after 15 days of St. *Hilary* in the 30th year of king *George* the ſecond."

"*Pierce*, Eſq; *v.* Earl *Faulconberg* and others.

"By conſent of counſel on both ſides, it is ordered, that there iſſue a writ of *diſtringas juratores* to be directed to the ſheriff of the county of *York*; in which ſhall be contained a clauſe commanding the ſaid ſheriff to have ſix or more of the firſt twelve of the jurors to be impanelled and returned to try the iſſue between the parties, at the place in queſtion, before the time of the trial of the ſaid iſſue, to wit, upon, *&c.* and that *B. R.* on the part of the plaintiff, and *J. W.* on the part of the defendant, ſhall attend on the ſame day and ſhew the matters in queſtion to the ſaid ſix or more of the firſt twelve of the ſaid jurors; and that the expences of taking the ſaid view ſhall be equally born by both parties: and no evidence ſhall be given, on either ſide, at the time of taking thereof."

"And by the like conſent, it is further ordered, that in caſe no *view* ſhall be had; or if a view ſhould be had by any of the ſaid jurors,

jurors, (whether they ſhould happen to be any of the *twelve* jurors who ſhall be firſt *named* in the ſaid writ, or not;) yet the ſaid trial ſhall proceed; and *no objection* ſhall be made on either ſide, either for *want* of a view, or that a view was not had by any of the *twelve jurors firſt* named, or for that it was not had by any *particular number* of the jurors named in the ſaid writ, or for want of a *proper return* to the ſaid writ."

The above recited rule was for a view to be had by a ſpecial jury; and was made abſolute at once, being conſented to by both parties: but during the remainder of the ſaid term (of *Hilary* 1757,) and alſo during the three following terms (of *Eaſter*, *Trinity* and *Michaelmas* 1757,) the court, upon proper affidavits granted like rules (*mutatis mutandis*) in caſes that were to be tried by *common* juries; making them only to ſhew cauſe; others abſolute in the firſt inſtance; but none without proper affidavits. Soon after, *viz.* in *Trinity* term 1758, they had made all theſe rules abſolute in the firſt inſtance; ſome upon affidavit; others as of courſe: ſince which time, they are become motions of courſe, without affidavit.

The form of them is as follows.

If the trial is to be by a ſpecial jury, the rule runs thus.

"It is ordered that there iſſue a writ of *diſtringas juratores*, *&c. &c.*—taking thereof;" (in the words of the firſt clauſe of the above recited rule between *Pierce* and Lord *Faulconberg*

Faulconberg and others.) The additional clauſe is expreſſed in theſe terms——The plaintiff, (or the defendant, *viz.* the party who prays the view,") conſenting that in caſe *no* view ſhall be had; or if a view ſhall be had by *any* of the ſaid jurors, whether they ſhall happen to be any of the *twelve* jurors who ſhall be *firſt* named in the ſaid writ, or not; yet the ſaid trial ſhall proceed; and no objection ſhall be made, on either ſide, on account *thereof*, or for *want of a proper return* to the ſaid writ."

The rule for a view, where the cauſe is to be tried by a *common* jury, could not continue the ſame, *ſince* the balloting act (*3 Geo. 2. c. 25.*) as it was *before*; nor could it be *exactly* like to that for views by *ſpecial* juries, (by reaſon of the particular directions given by the 14th ſection of the balloting act:) But it uſed to run much like it, only *mutatis mutandis*. The *preſent* form (*ſince* that act,) is this —" It is ordered that there iſſue a writ of *diſtringas juratores*, to be directed to the ſheriff of the county of *Y.* in which, ſhall be contained a clauſe commanding the ſaid ſheriff to have ſix or ſome greater number of *the* * jurors to be impanelled and returned to try the iſſue between the parties, † *who ſhall be mutually conſented to by the ſaid parties or their agents*, at the place in queſtion, before the time of the trial of the ſaid iſſue, to wit, upon, &c. and that *B. R.* on the part of the plaintiff, and *J. W.* on the part of the defendant,

N.B. this act (of 3 Geo. 2.) does not require them to be ſix of the firſt twelve.

† *Theſe words are taken from the ſame act of parliament*, ſect. 14.

defendant, ſhall attend on the ſame day, and ſhew the matters in queſtion to the ſaid ſix or ſome greater number *of the ſaid jurors, who ſhall be mutually conſented to as aforeſaid*; and that the expences of taking the ſaid view ſhall be equally born by both parties: and no evidence ſhall be given, on either ſide, at the time of taking thereof."

The additional clauſe, now added to this rule, is in theſe words——"The plaintiff," or "the defendant," (the party at whoſe inſtance the rule is prayed) "conſenting that in caſe no *view* ſhall be had; or if a view ſhall be had by *any* of the jurors, whether they ſhall happen to be ſick, *or any particular number of the jurors who ſhall be ſo mutually conſented to as aforeſaid*; yet the ſaid trial ſhall proceed; and no objection ſhall be made, on either ſide, on account *thereof*, or for *want of a proper return* to the ſaid writ."

Wedneſday *next after three weeks of the Holy* Trinity *in the ſeventh year of king* George *the third.*

Gape and *Smith.* IT is ordered, that there iſſue a writ of *diſtringas juratores* to be directed to the ſheriff of the county of *Eſſex*, and containing a clauſe commanding the ſaid ſheriff to cauſe ſix or more of the jury impanelled and returned to try the iſſue between the parties, whom the ſaid parties ſhall mutually chooſe, to take a view of the place in queſtion before the day of the trial of the ſaid iſſue, to wit, on *Wedneſday* the ninth day of *July* next; and by conſent of both parties, it is further ordered *Rule for a view.*

ordered that *Richard Gallop*, yeoman, on the part of the plaintiff, and *Simpſon Bullmore*, yeoman, on the part of the defendant, ſhall attend the ſame day, and ſhew the ſaid place to ſuch of the jury as ſhall be ſo choſe to view the ſame; and that the expences of the ſaid view ſhall be equally born by both parties, and no evidence on either ſide ſhall be given at the time of taking the ſaid view.

Upon the motion
of Mr. *Marſh.* *By the court.*

Diſtringas jur. *for a view.*

GEORGE the third, by the grace of God, of *Great Britain*, *France* and *Ireland* king, defender of the faith, *&c.* To the ſheriff of *Suſſex*, greeting: We command you, that you diſtrain the ſeveral perſons named in the panel annexed to this writ, the jury ſummoned in our court before us between *A. B.* plaintiff, and *C. D.* defendant, by all their lands and chattels in your bailiwic; ſo that neither they, nor any one by them, intermeddle therewith until you ſhall have another precept thereon from us; and that you anſwer to us of the iſſues of the ſame, ſo that you may have their bodies before us at *Weſtminſter* on *Wedneſday* after the morrow of *All Souls*, or before our juſtices aſſigned to take the aſſizes in your county, if they ſhall firſt come, on *Monday* the ſecond of *September*, at *Horſham* in your county, according to the form of the ſtatute in ſuch caſe lately made and provided, to make a certain jury of the country between the parties aforeſaid, of a plea of trepaſs, and to hear their judgment thereupon of many defaults. And in the

mean

mean time, according to the form of the ſtatute in ſuch caſe lately made and provided, we command you, that you have ſix of the firſt twelve of the ſaid jurors, or any greater number of them, at the place in queſtion upon the twentieth day of *Auguſt* next enſuing, who then ſhall have view of the ſaid place in the preſence of *J. M.* on the behalf of the plaintiff, and *W. F.* on the behalf of the defendant, appointed by our court before us, to ſhew the ſaid place to the ſaid jurors; and that in what manner you ſhall execute this our precept, you make return to us at *Weſtminſter*, and to our juſtices at the ſaid aſſiſes, remitting to us this our writ. Witneſs, *&c.*

Another. And in the mean time, according to the form of the ſtatute in this caſe lately made and provided, we further command you, that you cauſe ſix of the firſt twelve of the ſaid jurors impanelled and returned to try the iſſue joined between the ſaid parties, or as many more of them as you ſhall think fit, to take a view of the place in queſtion on the day of, *&c.* and that the ſaid jurors meet on the ſame day at the houſe of *E. F.* (as in the rule for the view) in your county, and proceed from thence to view the ſaid place, in the preſence of *G. H.* on the part of the plaintiff, and *J. K.* on the part of the defendant, appointed by our court before us to ſhew the ſaid place to ſuch of the ſaid jurors as ſhall come to view the ſame; and that you make appear to us at *Weſtminſter* on the ſaid next after in what manner you ſhall

ſhall have executed this our precept; and that you have then there this writ. Witneſs, *&c.*

Another. We command you, that in the mean time, according to the form of the ſtatute in ſuch caſe lately made and provided, you have ſix or more of the ſaid jurors, whom the ſaid *John Gape* and *James Smith* ſhall mutually chooſe, at the place in queſtion on the ninth day of *July* next enſuing, who ſhall then have view of the ſame in the preſence of *Richard Gallop*, yeoman, on the part of the plaintiff, and *Simpſon Bullmore*, yeoman, on the part of the defendant, appointed by our court before us to ſhew the ſaid place to the ſaid jurors; and that you return to us at *Weſtminſter* on the day aforeſaid, and to our juſtices at the aſſiſes aforeſaid, in what manner you ſhall execute this our writ, ſending to us this writ and the names of the ſaid jurors. Witneſs, *&c.*

If there be occaſion, you make out a * *ſubpœna* for witneſſes.

GEORGE

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* If a witneſs being ſubpœna'd does not attend, it is a good foundation for an attachment, the diſobedience to the *ſubpœna* being a contempt to the court; and tho' an action may be brought on the ſtatute of *Elizabeth*, yet that is a more dilatory method and more difficult to proceed in, which encourages witneſſes not attending frequently upon trials at which they are ſubpœna'd to appear and give evidence, and therefore the rule for an attachment in this caſe was made abſolute. *Trin.* 2 *Geo.* 2. *Wyat* v. *Winkford*, 2 *L. Raym.* 1528. 2 *Stra.* 810. *Barnard. K. B.* 45.

GEORGE the third, by the grace of God, of *Great Britain*, *France* and *Ireland* king, defender of the faith, &c. To *A. B. C. D. E. F. G. H.* (you may put in four witneſſes) greeting: We command you, that all and ſingular buſineſſes and excuſes being laid aſide, you and every one of you be in your proper perſons before our right truſty and well-beloved *William* Lord *Mansfield*, our chief juſtice aſſigned to hold pleas in our court before us † at *Weſtminſter Hall* in the county of *Middleſex*, on the day of next (the day of the trial) to teſtify all and ſingular what you, or either of you, know in a certain action now pending undetermined in our court before us, between *J. K.* plaintiff, and *L. M.* defendant, of a plea of treſpaſs on the caſe, (as the action is) and at that day to be tried by a jury of the country; and this you, or any of you, are by no means to omit, under the penalty upon each of you, of one hundred pounds. Witneſs *William* Lord *Mansfield* at *Weſtminſter*, the day of (a day in term before the trial and ſervice) in the year of our reign.

Lee.

Subpœna *for witneſſes.*

† *If at the aſſiſes, ſay, before our juſtices aſſigned to take the aſſiſes in the county of —— if in* London *ſay, at* Guildhall, London.

Middleſex, to wit. A *Subpœna* to teſtify for *A. B.* plaintiff, againſt *C. D.* defendant, of a plea of treſpaſs upon the caſe.

R. R. attorney,
July 1768.

A præcipe *for the office.*

You pay for ſigning this writ 1 *s.* 8 *d.* Sealing 7 *d.*

You muſt take out a ticket for each witneſs to the following purport.

A ſubpœna ticket.

To Mr. Benjamin Parker,

BY virtue of a writ of *ſubpœna* to you directed, and herewith ſhewn unto you, you are commanded perſonally to be and appear before the right honourable *William* Lord *Mansfield*, lord chief juſtice of his majeſty's court of *King's Bench*, on *Monday* the fifteenth day of *July* inſtant by eight of the clock in the forenoon of the ſame day, at *Weſtminſter Hall* in the county of *Middleſex*, to teſtify the truth according to your knowledge, in a certain cauſe now depending, and there to be tried between *Morgan Edwards*, Eſq; plaintiff, and *Griffith Roberts*, defendant, in a plea of treſpaſs on the caſe, on the part of the defendant; and hereof you are not to fail, upon pain of one hundred pounds. Dated the tenth day of *July* in the year of the reign of our ſovereign lord *George* the third, king of *Great Britain*, *&c.* in the year of our lord 1768.

J. S. attorney for the defendant.

By the court.

If any of the witneſſes ſhould be in priſon, you may have a *habeas corpus ad teſtificandum.*

GEORGE

GEORGE the third, by the grace of God, of *Great Britain*, *France* and *Ireland* king, defender of the faith, &c. To the warden of our prison of the *Fleet* greeting: We command you, that you have the body of *E. F.* detained in our prison under your custody as it is said, by whatsoever name he may be known in the same, under safe and secure conduct, before our right trusty and well beloved *William* Lord *Mansfield* our chief justice, assigned to hold pleas in our court before us, at *Westminster Hall* in the county of *Middlesex*, on the day of (the day of the trial) at o'clock in the noon of the same day, there to testify the truth of his knowledge in a certain cause now depending in our court before us, and then and there to be tried between *A. B.* plaintiff, and *C. D.* defendant, in a plea of trespass on the case, and then immediately after the said

* Habeas corpus ad testificandum.

* A general rule was made by the court, that no *habeas corpus* (*ad testificandum*) of either side, civil or crown, should be granted without an affidavit that they are material witnesses. *Mich.* 9 *Geo.* 1. *B. R. The King* against *Layer*, *Forteſc. Rep.* 396. And in this case *Eyre* just. said, he never granted one in a civil case at his chambers without an affidavit; and agreed, a judge might grant one at his chambers on an affidavit, and in a civil case said, that sometimes they give security. *Nota*; this affidavit must be made by the party plaintiff, or defendant applying for the *habeas corpus*; and so it is on an application to put off a trial upon affidavit of the absence of a material witness; This affidavit must be made by the defendant, for no one else can justly swear that the witness is a material witness.

E. F. ſhall have then and there given his teſtimony before the ſaid chief juſtice, to return the ſaid *E. F.* to our ſaid priſon, under ſafe and ſecure conduct; and have then there this writ. Witneſs, *&c.*

Lee.

Of examining witneſſes on interrogatories before a judge.

If a witneſs be going beyond ſea, ſo that he cannot be had at the trial, he may by rule of court be examined before one of the judges of the court upon interrogatories, but notice of the time of the examination muſt be given to the attorney on the other ſide, who ſhall be at liberty alſo to croſs-examine him, and the depoſitions ſo taken may be read as evidence at the trial.

The form of the interrogatories.

Interrogatories for the plaintiff.

Interrogatories to be adminiſtered to *E. F.* a witneſs to be produced, ſworn and examined on the part and behalf of *A. B.* plaintiff, againſt *C. D.* defendant, before Sir *Michael Foſter*, knt. one of his majeſty's juſtices of the court of *King's Bench*, purſuant to a rule of the ſaid court, made on *Wedneſday* next after the morrow of St. *Martin* in the ſeventh year of king *George* the third.

Imprimis,

Imprimis, Do you know the parties plaintiff and defendant in the title of these interrogatories named, or either, and which of them, and how long have you known them, either, and which of them? Declare.

Second *Item*; Was you in the year, *&c.* for (asking the witness such proper questions relating to the matter in issue as he is capable of answering.)

Interrogatories for the defendant. } Interrogatories to be administered on the behalf of the defendant to *E. F.* a witness to be produced, (*as before.*)

These interrogatories must be signed by counsel; and after the witness is examined by both parties, the judge's clerk will deliver out copies of the depositions.

On circuit writ and record to be entered together.

In every cause to be tried before the judges in their respective circuits, the writ and record shall be entered together, and no record shall be received without the writ. *Trin.* 10 & 11 *Geo.* 2.

To be entered before first sitting after commission day, except in York *and* Norfolk.

No writ and record of *nisi prius* shall be received at the assises in any county in *England*, unless they shall be delivered to and entered with the marshal, before the first sitting of the court after the commission-day, except in the counties of *York* and *Norfolk*; and there the writs and records shall be delivered to and entered with the marshal before the first sitting of the court on the second day after the commission-day, otherwise they shall

Cauſe to be tried in order as entered, unleſs, &c.

not be received. Every cauſe ſhall be tried in the order in which it is ſo entered, without any preference or delay, unleſs it ſhall be made out to the ſatisfaction of the judge in open court, that it is impracticable or inconvenient ſo to do, who thereupon may make ſuch order for the trial of the cauſe, ſo put off, as to him ſhall ſeem juſt. *Hil.* 14 *Geo.* 2.

Liſt of cauſes as entered to be fixed up.

A liſt of the cauſes when ſo entered as aforeſaid, ſhall be made by the marſhal, and forthwith fixed up in ſome publick place in the *niſi prius* court, there to remain during the whole time of the aſſiſes. *Same rule.*

Per Holt ch. j. Where a tradeſman brings an action, his books are not evidence for him; yet if the defendant deſires that the books may be produced, and the plaintiff refuſes, his cauſe is very ſuſpicious. *Comb.* 261.

In London *or* Middleſex *cauſe to be entered in judge's book two days before ſitting.*

If your cauſe is to be tried in *London* or *Middleſex* within the term, it muſt be entered in the judge's book two days before the ſitting, for which notice of trial is given: otherwiſe a *ne recipiatur* may be entered by the defendant. *Hil.* 15 & 16 *Car.* 2.

In Middleſex *record to be delivered and entered within 2 days after the laſt day of term.*

No record of *niſi prius* will be received at any ſitting after term in *Middleſex*, unleſs the ſame ſhall be delivered to and entered with the marſhal within two days after the laſt day of every term.

And in London *the day before the day to which the ſittings ſhall be adjourned.*

No record of *niſi prius* will be received at any ſitting after term in *London*, unleſs the ſame ſhall be delivered to and entered with the marſhal the day before the day to which the ſittings in *London* ſhall be firſt adjourned.

And every cauſe to be tried at *niſi prius* in *London* and *Middleſex*, ſhall be tried in the order in which it is entered, (beginning with *remanets*) unleſs it ſhall be made out to the ſatisfaction of the judge of *niſi prius* in open court, that there is reaſonable cauſe to the contrary, who thereupon will make ſuch order for the trial of the cauſe ſo put off, as to him ſhall ſeem juſt. Notice given by the clerk of *niſi prius*, Mich. 17 Geo. 2. *Cauſes to be tried as entered, unleſs, &c.*

You pay for entering a cauſe 11 *s.* 8 *d. viz.* chief juſtice 6 *s.* 8 *d.* marſhal 4 *s.* cryer 1 *s.*

If the cauſe is to be tried at the ſittings after term, no *ne recipiatur* can be entered until after proclamation made by the order of the chief juſtice for the attornies to bring in their records; and then if the record be not brought in, a *ne recipiatur* may be entered. *At ſittings after term no* ne recipiatur *till after proclamation.*

If the plaintiff be hindered from trying his cauſe by the defendant's entering a *ne recipiatur*, the plaintiff may try it the next ſitting, if in *London* or *Middleſex*, upon giving notice to the defendant or his attorney on the day of the ſitting, on which it ſhould have been tried, before the riſing of the court. *Mich.* 4 *Annæ.* *Plaintiff hindered of trial by* ne recipiatur *may try the cauſe at next ſitting on notice.*

In like manner, if notice of trial be given for a day certain in *London* or *Middleſex*, and the plaintiff is not ready on that day to proceed to trial, the cauſe may be tried the next ſitting, upon giving like notice, as where a *ne recipiatur* is entered by defendant. *As he may if not ready at the day for which firſt notice was given.*

But in either caſe, if the cauſe be not tried at ſuch next ſitting, notice is to be given as at firſt, unleſs it be made a *remanet*, when new notice of trial is never given, but the *If not tried at next ſitting, notice to be given as at firſt, unleſs a remanet.*

defendant is bound to attend 'till the cauſe is tried. *Vide* 2 Str. 1119. Notice to be continued but once.

Two days notice of countermand, except.

Two days notice of a countermand of trial is ſufficient, unleſs it be of a trial to be had at the aſſiſes, and the countermand is given to the agent in town; in which caſe it ought to be four days before the commiſſion-day. But the days muſt be reckoned excluſive: for a countermand on the 16th, the aſſizes being on the 19th, is bad. 2 *Str.* 849. *Sed vide antea, fol.*

If plaintiff don't countermand, defendant may have his coſts.

If the plaintiff does not proceed to trial, or countermand in time, the defendant, on affidavit of attendance and neceſſary expences, ſhall have his coſts to be taxed by the ſecondary.

Trial not ſtayed for not paying coſts for not going to trial on former notice. 1 Sid. 279. Andr. 17. Salk. 255. 1 R. Raym. 697.

If the plaintiff gives notice, but does not proceed to trial, whereby coſts are taxed for the defendant, and afterwards gives freſh notice, (perhaps with deſign to put the defendant to further coſts) yet the court will not ſtay the trial 'till the firſt coſts are paid, (except in ejectment) becauſe the defendant has a remedy for them; and if the plaintiff ſhould not try the cauſe purſuant to his ſecond notice, the defendant will again have coſts, and the like remedy to obtain them.

Trials at bar by ſpecial juries.

The manner of ſtriking a ſpecial jury.

All iſſues to be tried at the bar are to be tried by a ſpecial jury ſtruck by the ſecondary, which is in this manner: The ſheriff attends the ſecondary with the book or liſt of freeholders, or perſons qualified to ſerve on juries; and the ſecondary, in the preſence of the attornies of both parties, names thereout forty-eight, of which twelve are ſtruck out

on

on each ſide, and the remaining twenty-four are to be returned by the ſheriff to try the iſſue and if either of the parties ſhall neglect to attend the ſecondary on ſtriking a ſpecial jury, the ſecondary on behalf of the abſent party ſhall ſtrike out twelve names. *Trin.* 8 *W.* 3. 2 *Lill. Pr. Reg.* 122, 123. 1 *Salk.* 405, 625, 648, 649, 651. 1 *Mod. Ca. Law and Eq.* 245, 248. 2 *Jon.* 222. *Stat.* 3 *Geo.* 2. *c.* 25. §. 15, 16, 17. *Mich.* 8 *Geo.* 2. *B. R. The King* againſt *Johnſon.*

At the charge of the party applying for a ſpecial jury. Andr. 51, 53. 2 Stra. 1080.

The ſecondary and under-ſheriff had formerly each a guinea a ſide from plaintiff and defendant; but now by act of 3 *Geo.* 3. *c.* 25. the whole charge of ſtriking the ſpecial jury lies on the party applying for it.

No trial at bar in an iſſuable term, except. Andr. 271, 273.

A trial at bar is ſeldom allowed by the court to be in an * iſſuable term, unleſs the crown is actually concerned in intereſt.

Trial at bar by original muſt be on the quarto die poſt of the venire.

Every trial at bar, where the proceedings are by original, muſt be on the *quarto die poſt*, after the return of the *venire facias*, as if

* Arg. A ſecond rule cannot be made for a trial at bar between the ſame parties in the ſame term, nor can it be in an iſſuable term. *Paſch.* 4 *Geo.* 2. *B. R. Fitz-Gibb.* 267. But on a motion for a trial at bar the next term, though an iſſuable one, the court ſaid, that the lord chancellor had declared to them, that if the court could not diſpenſe with their rule againſt trying cauſes at the bar in an iſſuable term, he muſt and would decree the iſſue againſt the defendant *pro confeſſo*; and upon that they ſaid they would diſpenſe with it, and accordingly did. *Mich.* 4 *Geo.* 2. *B. R.* 1 *Barnard.* 370.

if the *venire* be returnable on the octave of St. *Martin*, being the 18th of *November*, the trial muſt be on the 21ſt of *November*. Sed Q. & vide antea diſtringas, fol.

Day of trial at bar to be appointed by the court, but plaintiff may countermand.

The day of the trial at bar is always appointed by the court; but yet the plaintiff is at liberty to countermand his notice of trial, and to prevent the cauſe being tried on that day, which if he does, it cannot afterwards be brought to trial, unleſs ſome day be appointed again by the court.

After trial at bar no new trial, unleſs, &c. Vide Andr. 323, contra.

† After a trial at bar no new trial ſhall be granted in any cauſe, unleſs it appears that there has been ſome corruption or miſdemeanor in the jury. *Mich.* 11 *W.* 3. *B. R. Argent* v. *Darrel*, *Carth.* 507.

When the trial is over in *London* or *Middleſex*, the aſſociate delivers you the record immediately, and you ingroſs the *poſtea* on the back of the record. At the aſſiſes the aſſociate keeps the record 'till the next term, and indorſes the *poſtea*.

Poſtea *for the plaintiff on* non eſt factum.

Afterwards, that is to ſay, on the day and at the place within contained, before *William* Lord *Mansfield*, the chief juſtice within written, ——*Robley*, gent. being aſſociated unto

† After a trial at bar, tho' the court diſſatisfied with the verdict, a new trial denied; and ſaid, it had never been done here but upon iſſues out of chancery, which being only to ſatisfy the conſcience of the chancellor, are not *ſtricti juris*. 1 R. Raym. 514. Salk. 648. Carth. 507. Holt 702. Salk. 650. Fareſt. 70, 121, 156. Holt 265, 266.

A cauſe cannot be tried at bar where the action is laid in *London*, by reaſon of their charter. 2 *Salk.* 644.

to the ſaid chief juſtice, by force of the ſtatute in that caſe made and provided, the within named *A. B.* (the plaintiff) came by his attorney within contained, and the within named *C. D.* (the defendant) although ſolemnly demanded came not, but made default. Therefore let the jurors of the jury within mentioned be taken againſt him by default; and the jurors of that jury being ſummoned came, who to ſay the truth of the within contents, being choſen tried and ſworn, ſay upon their oath, that the within mentioned writing obligatory is the deed of the within named *C. D.* as the within written *A. B.* has within declared againſt him; and they aſſeſs the damages of the within named *A. B.* by occaſion of the detaining the within written debt, over and above his coſts and charges by him about his ſuit in this behalf expended, to twelve pence, and for thoſe coſts and charges to forty ſhillings.

Defendant makes default.

Afterwards, on the day and at the place within contained before Sir *E. W.* knt. one of the juſtices of our lord the king of the bench, and *S. S. S.* eſq; one of the barons of the *Exchequer* of our ſaid lord the king, juſtices of our ſaid lord the king aſſigned to take the aſſiſes in the county of the city of *York*, according to the form of the ſtatute, *&c.* the within named *A. B.* (the plaintiff) came by, *&c.*

Poſtea at the aſſiſes.

Afterwards, on the day and at the place within contained before Sir *M. F.* knt. one of the juſtices of our lord the king of the bench, and *F. S.* eſq; to the ſaid Sir *M. F.* and Sir *T. P.* knt, chief baron of the *Exchequer* of our

Where one of the judges does not come to the aſſiſes.

our ſaid lord the king, juſtices of our ſaid lord the king, aſſigned to take the aſſiſes in the county of *Cornwal*, by form of the ſtatute, *&c.* in this behalf aſſociated, the preſence of the ſaid Sir *T. P.* not being expected, by virtue of the writ of our ſaid lord the king of *ſi non omnes*, *&c.* the within named *A. B.* came by, *&c.*

For plaintiff ex nil debet.

Say, That the within named *C. D.* doth owe to the within named *A. B.* the 500 *l.* within mentioned, in manner and form as the ſaid *A. B.* within complains againſt him, and aſſeſs, *&c.* [as the laſt.]

For the plaintiff on non aſſumpſit.

Say, That the within named *C. D.* did undertake * in manner and form as the within named *A. B.* within complains againſt him, and they aſſeſs the damages of the ſaid *A. B.* by occaſion of the not performing the within mentioned promiſes and undertakings, over and above his coſts, *&c. ut ſupra.*

For plaintiff in treſpaſs.

Say upon their oath, That the within named *C. D.* is guilty of the premiſſes within laid to his charge in manner and form as the ſaid *A. B.* within complains againſt him, and they aſſeſs the damages of the ſaid *A. B.* by occaſion thereof, over and above, *&c.*

For plaintiff on iſſue of plene adminiſtravit.

Say upon their oath, That the ſaid *Catherine Franklin* has, and on the day of exhibiting the bill of the within written *R. J.* to wit, on the tenth day of *April* in the year of the reign of our ſovereign lord the preſent king, had divers goods and chattels, which were

* Verdict that the defendant aſſumed *modo & forma*, without ſaying to whom, good. *Noy* 83.

were of the ſaid *Richard Franklin* at the time of his death, in her hands, to be adminiſtered, to the value of the debt within ſpecified, whereby the ſaid *J. R.* might have been ſatisfied of his ſaid debt, to wit, at *Marlborough* within written, in the county aforeſaid; and they aſſeſs the damages of the ſaid *J. R.* by occaſion thereof, over and above his coſts and charges by him about his ſuit in this behalf expended, to and for theſe coſts and charges to 40 *s.*

For plaintiff in ejectment.

Say upon their oath, That the ſaid *Charles Trubſhawe* is guilty of the treſpaſs and ejectment within written, in manner and form as the ſaid *William* within complains thereof againſt him; and they aſſeſs the damages of the ſaid *William* by occaſion thereof, over and above, *&c.*

In ejectment, guilty as to part, not guilty as to the reſidue.

As to the treſpaſs and ejectment of one moiety of the within written tenements, they ſay upon their oath, that the ſaid *C. D.* is guilty thereof, as the ſaid *A. B.* within complains thereof againſt him; and they aſſeſs; (*vide antea*) and as to the treſpaſs and ejectment of the other moiety of the tenements within written, the ſaid jurors ſay upon their oath, that the ſaid *C. D.* is not guilty thereof, as the ſaid *A. B.* has within by pleading alledged. Therefore, *&c.*

For plaintiff on non aſſumpſit infra ſex annos.

Say upon their oath, that the ſaid *Thomas* within ſix years next before the within written day of exhibiting the within ſpecified bill of the ſaid *Edward*, to wit, on the within written firſt day of *April* in the year of the reign of our ſovereign lord *George* the third, now king of *Great Britain*, *&c.* in the

the within written declaration ſpecified, undertook in manner and form as the ſaid *Edward* has within by replying alledged; and they aſſeſs, *&c.*

Plaintiff non-proſs'd.

And the jurors of that jury being ſummoned came, who to ſay the truth of the within contents were choſen, tried and ſworn, and after evidence being given to them of and upon the iſſue within contained, went from the bar of this court to diſcourſe of their verdict of and upon the premiſſes; and after the ſaid jury had diſcourſed and agreed among themſelves, they came back to the ſaid bar to give their verdict in this behalf; upon which the ſaid *Thomas Meſſiter* being ſolemnly demanded came not, nor did he further proſecute his ſaid bill againſt the ſaid *Thomas* Therefore, *&c.*

For the defendant's damages, according to the form of the ſtatute, to 5*l.* 10*s.*

Juror withdrawn.

Were choſe, tried and ſworn, upon which for certain cauſes moving as well the ſaid chief juſtice as the parties, *E. F.* one of the jurors of the ſaid jury was withdrawn from the panel, and the reſidue of the jurors of that jury were intirely diſcharged from giving any verdict of and upon the within written premiſſes, *&c.*

For the defendants on not guilty in treſpaſs.

Say upon their oath, That the ſaid *Thomas King* and *Obadiah Reynolds* are in no wiſe guilty of the treſpaſs in the declaration within ſpecified, as the ſaid *Thomas* and *Obadiah* have by their pleading within alledged. Therefore, *&c.*

Say

Say upon their oath, That the ſaid *Edward* did not, at any time within ſix years next before the ſuing out the ſaid writ, break and enter the houſe of the ſaid *Thomas* nor take and carry away the goods and chattels, and money of the ſaid *Thomas* within contained, as the ſaid *Edward* has within by pleading alledged, *&c.* *For the defendant in treſpaſs on the ſtatute of limitations pleaded.*

Say upon their oath, That the ſaid *Edward*, at the time of exhibiting the bill of the ſaid *Robert* within ſpecified, had fully adminiſtered all the goods and chattels which were of the ſaid *Thomas* at the time of his death, in his hands to be adminiſtered; and that he the ſaid *Edward* has not, nor on the day of exhibiting the within ſpecified bill, or at any time afterwards, had any goods or chattels which were of the ſaid *Thomas* at the time of his death, in his hands to be adminiſtered, wherewith he was able to pay the debt within ſpecified, or any part thereof, to the ſaid *Robert*, as he in bar of the ſaid *Robert* has within by pleading alledged. *For the defendant on* plene adminiſtravit.

Say upon their oath, That the ſaid *C. D.* on the day, *&c.* had divers goods and chattels, which were of the within named *L. K.* at the time of his death, in his hands to be adminiſtered, to the value of, *&c.* whereof he might have ſatisfied the ſaid *A. B.* the within written debt, as the ſaid *A. B.* within by replying has alledged, and they aſſeſs, *&c.* *For the plaintiff in* plene adminiſtravit.

Say upon their oath, That the within named *William Bulkly*, the teſtator, did not in his life-time undertake in manner and form as the ſaid *William* has within declared. *For defendant executor, that his teſtator* non aſſumpſit.

Afterwards,

Poſtea *on non-ſuit.* Afterwards, on the day and at the place within contained before *William* lord *Mansfield*, chief juſtice within named, and —— *Robley*, gentleman, aſſociate to him by form of the ſtatute in that caſe made and provided, cometh as well the within named *S. W.* (the plaintiff) as the within written *J. M.* (the defendant) by their attornies within mentioned, and certain of the jurors of the jury whereof mention is within made, to wit, *J. T. &c.* being drawn by ballot, according to the form of the ſtatute, *&c.* and being called over likewiſe come, who to ſpeak the truth of the matters within contained, being elected, tried and ſworn, conferred together about giving their verdict; and having conferred together, were agreed to give their verdict: Whereupon the ſaid *S. W.* although ſolemnly called cometh not, nor hath he further proſecuted his writ within mentioned againſt the ſaid *J. M.* Therefore, *&c.*

For the plaintiff in treſpaſs and aſſault. Say upon their oath, That the within named *C. D.* is guilty of the within written treſpaſs and aſſault, as the ſaid *A. B.* within complains againſt him; and they aſſeſs, *&c.*

Part for the plaintiff, part for the defendant, ſur aſſumpſit. As to the firſt and laſt promiſe in the declaration within mentioned, they ſay upon their oath, That the ſaid *C. D.* undertook in manner and form as the ſaid *A. B.* within complains againſt him, and they aſſeſs the damages of the ſaid *A. B.* by occaſion thereof, over and above his coſts and charges by him about his ſuit in this behalf expended, to 10*l.* and for thoſe coſts and charges to 40*s.* and as to the reſidue of their promiſes and undertakings in the ſaid declaration alſo within mentioned,

mentioned, the ſaid jurors further upon their ſaid oath ſay, That the ſaid *C. D.* did not undertake in manner and form as the ſaid *C. D.* within by pleading for himſelf has alledged. Therefore, *&c.*

One defendant guilty in treſpaſs, the others not.

Say upon their oath, that the ſaid *R. F.* is guilty of the treſpaſs within written, as the ſaid *A. B.* within complains thereof againſt him, and they aſſeſs damages, *&c.* And the ſaid jury further upon their ſaid oath ſay, that the ſaid *J.* and *W.* are not guilty of that treſpaſs, as the ſaid *J.* and *W.* within by pleading for themſelves have alledged. Therefore, *&c.*

On ſeveral iſſues in aſſault and impriſonment.

As to the iſſue within written, between the ſaid *A. B.* and the ſaid *J.* and *W.* within joined, they ſay upon their oath, That the ſaid *J.* and *W.* are guilty of the treſpaſs, aſſault and impriſonment within written, as the ſaid *A. B.* within complains thereof againſt them; and as to the other iſſue within written between the ſaid *A. B.* and the ſaid *G.* within firſt joined, the ſaid jurors upon their oath further ſay, That the ſaid *G.* is guilty thereof, as the ſaid *A. B.* within complains thereof againſt him. And as to the laſt iſſue within written between the ſaid *A. B.* and the ſaid *G.* within laſt alſo joined, the ſaid jurors upon their ſaid oath further ſay, That the ſaid *G.* on the day and year within written of his own proper injury, without the cauſe by him within alledged, made an aſſault on the ſaid *A. B.* and beat, wounded and evil treated him, ſo that his life was greatly deſpaired of, in manner and form as the ſaid *A. B.* within by replying has alledged; and they aſſeſs the da-

mages of the ſaid *A. B.* by the occaſion within written, over and above, *&c.*

For the plaintiff in a plea of ſolvit ad diem.

Say upon their oath, That the ſaid *C. D.* did not pay to the ſaid *A. B.* the within ſum of 10*l.* upon the within written day of which upon that day he ought to have paid, as, *&c.* and they aſſeſs, *&c.*

Poſtea *to be marked before coſts taxed.*

Every attorney, who receives any *poſtea* from the aſſociate, ought to get it marked by the clerk of the *poſteas* within two days after he receives it. *Trin.* 2 *Jac.* 1. But now it is thought ſufficient if the *poſtea* is marked at any time before the coſts are taxed; you pay the clerk of the *poſteas* 4*d.* then you give a rule on the *poſtea* with the clerk of the rules, for which you pay 1*s.* 4*d.* *Vide* Andrews 296.

Four days to move in arreſt of judgment, or for a new trial.

No judgment can be entered upon a writ of *niſi prius*, or enquiry given either for plaintiff or defendant, until the expiration of four days, excluſive of the entry of a rule for judgment, during which four days the party, againſt whom the verdict paſſed, may move the court in arreſt of judgment, or for a new trial.

Sunday, *or any day on which the court does not ſit, is not accounted one of the four days, except.*

Sunday or any other day on which the court doth not ſit, is not accounted one of the four days, unleſs the rule be entered on the laſt day of the term, or within four days after the term, (during which four days it is the practice to enter theſe rules as of the laſt day of the term; and at the expiration of four days excluſive after entering ſuch rule, judgment may be entered.

This

This rule ought not to be entered before the day in bank; and is not neceſſary if the plaintiff be nonſuited, but judgment in that caſe may be entered immediately after the day in bank.

Rule not to be given before day in bank, or on a nonſuit.

If the party moves for a new trial, and it is denied, he may afterwards move in arreſt of judgment; but if he moves in arreſt of judgment and fails, he cannot afterwards move for a new trial.

No motion for a new trial after motion in arreſt of judgment.

After the rule for judgment is out, you muſt get the *niſi prius* record ſtamped with a double half-crown ſtamp, and then apply to the ſecondary to tax the coſts; which being done, the judgment is to be entered of record, and ſuch execution as may be neceſſary, properly ſued out.

Of ſigning final judgment.

If the iſſue joined be not an iſſue in fact, but an iſſue in law, as a demurrer, then as ſoon as the paper-book is returned you muſt enter the proceedings on record, which being brought into court, you get a counſel to move for a *concilium*, and then enter the cauſe with the clerk of the papers, and deliver the paper-books to the judges in manner before directed; and the court upon the argument will give judgment.

Method of going to argument on demurrer.

Of judgments by default, &c.

Where the defendant does not plead by the time limited, or judgment is given againſt him on demurrer, if it be in debt, the judgment is final, to be ſigned on a double half-crown ſtamped ſheet of paper, on which and

Judgments by default in debt.

on a judgment roll the judgment is to be entered in manner as hereafter is directed. If the action is in caſe, treſpaſs, *&c.* the judgment is only interlocutory 'till a writ of inquiry be executed, and is ſigned on a double penny ſtamped ſheet of paper. *Vide Carth.* 362, 270.

In caſe.

By relicta verificatione.

After a plea the defendant may * *relicta verificatione* confeſs the action.

Notice of inquiry.

You give the like notice in all caſes of executing a writ of enquiry, as of a trial, except where the practice is altered by the *Stat.* 14 *Geo.* 2. *c.* 17. *Vide antea, fol.*

Notice of executing a writ of inquiry by 10 o'clock bad, for incertainty. 2 *Str.* 1142.

Writ of inquiry.

GEORGE the third, by the grace of God, of *Great Britain*, *France* and *Ireland* king, defender of the faith, *&c.* To the ſheriff of *Middleſex* greeting. Whereas *A. B.* lately in our court, before us at *Weſtminſter*, by bill, without our writ, impleaded *C. D.* being in the cuſtody of the marſhal of our *Marſhalſea*, before us; for this, to wit, that whereas

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* In ejectment the defendant pleaded not guilty, and then *relicta verificatione* confeſſed the action, and the defendant's attorney ſubſcribed the declaration accordingly. Upon which it was moved, that the court would permit the plaintiff to enter judgment for himſelf. But *per curiam*, The defendant's attorney ought to come in proper perſon before the maſter of the office, and do it there. And though it was urged that the attorney could not come by any poſſibility, yet the motion was denied. *Trin.* 10 *W.* 3. 1 *R. Raym.* 345.

whereas the ſaid *C. D.* on [ſet forth the whole declaration (only inſtead of ſaying in the year of the reign of, *&c.* ſay in the year of our reign) to] To the damage of the ſaid *A. B.* of pounds, as he ſaid, and thereupon he then brought his ſuit, *&c.* and ſuch proceedings were thereupon had in our ſaid court before us at *Weſtminſter*, that the ſaid *A. B.* ought to recover againſt the ſaid *C. D.* his damages by means of the premiſſes, [or of not performing the ſaid ſeveral promiſſes and undertakings.] But becauſe it is unknown to our ſaid court before us what damages the ſaid *A. B.* hath ſuſtained by means of the aforeſaid premiſſes: We therefore command you, that by the oath of * twelve good and lawful men of your bailiwic you diligently inquire what damages the ſaid *A. B.* Andrews 78.

* A judgment in an inferior court was reverſed becauſe there was but two jurors on the inquiry, though cuſtom was alledged to warrant it. *Per cur'*: There cannot be leſs than twelve, though the writ of inquiry generally ſayeth only *per ſacramentum proborum & legalium hominum*, and not *duodecim*, as in a *venire*. 1 Vent. 113.

Exception, the ſum is in figures; *non allocatur*, for they are XII *Latin* figures; *aliter*, if they had been 12 *Engliſh* figures, or in figures in an inferior court. *Skin.* 409. *Vide* 1 *Mod.* 2.

Holt ch. j. A judge of *niſi prius*, upon trial of a writ of inquiry, is only an aſſiſtant to the ſheriff, and has no judicial power; and if the parties come to any agreement there, the way to make it effectual is to bring it to him to ſign, and after to move the court to have it made a rule of *court*. *Hil.* 13 *W.* 3. *B. R. Anonymus.* 12 *Mod.* 610. Inquiry executed on the day of the return, good. 2 *R. Raym.* 1449.

hath ſuſtained, as well by means of the premiſſes aforeſaid, as for his coſts and charges by him about his ſuit in this behalf expended, and that you ſend to us at *Weſtminſter* on next after the inquiſition, which you ſhall thereupon make, under your ſeal, and the ſeals of them by whoſe oath you ſhall take that inquiſition, together with this writ, Witneſs *William* Lord *Mansfield*, at *Weſtminſter*, the day of in the year of our reign.

Andrews 74.

Lee.

This writ is not ſigned, but only ſealed, for which you pay 7 *d.*

If executed in *Middleſex*, you pay the ſheriff 1 *l.* 10 *s.* 4 *d.* which is divided thus, to the ſheriff 10 *s.* Under-ſheriff 3 *s.* 4 *d.* Bailiff for ſummoning the jury 4 *s.* For the room 1 *s.* To the jurors 1 *s.* each. 12 *s.* beſides 4 *d.* for each witneſs ſworn.

You may have a *ſubpœna*, if occaſion be, for your witneſſes.

Subpœna *on inquiry.*

GEORGE the third, by the grace of God, of *Great Britain*, *France* and *Ireland* king, defender of the faith, *&c.* To *E. F. G. H. &c.* greeting. We command you, that all and ſingular buſineſſes and excuſes being laid aſide, you, and every of you, be in your proper perſons before our ſheriff of *Middleſex*, on the day of at o'clock in the noon of the ſame day, at the court-houſe at *Weſtminſter*, [if in vacation, or in an afternoon in term-

time:

time (at the *Three Tuns* in *Brook-ſtreet* near *Holbourn*)] in the county of *Middleſex*, to teſtify the truth in a certain matter of controverſy pending in our court, before us at *Weſtminſter*, between *A. B.* plaintiff, and *C. D.* defendant, on a plea of [as the action is.] * In which ſaid matter a writ of inquiry of damages will then and there be executed. And this you, or any of you, are by no means to omit, under the penalty upon each of you of 100 *l.* Witneſs, *&c.*

You ſign and ſeal this writ, and make out a note for the office, and tickets for the witneſſes, as before directed.

Mr. ———

By virtue of a writ of *ſubpœna* to you directed, and herewith ſhewn unto you, you are perſonally to be and appear before † our ſheriff of the county of or his under-ſheriff on the day of inſtant, at 10 o'clock in the forenoon of the ſame day at the houſe of in in the ſaid county, then and there to teſtify the truth according to your knowledge, upon a writ of inquiry of damages to be then and there executed in a certain cauſe now depending between plaintiff and defendant in a plea of

Subpœna *ticket on a writ of inquiry.*

† *Some put the ſheriff's name.*

T 4 on

* In which ſaid plea, our certain writ of inquiry of damages hath been ſent by us, out of our court before us, and directed to the ſaid ſheriff of *S.* then and there in due form of law to be executed before the ſaid ſheriff. *Read Cler. Inſtruc. K. B.* 201. *Inſtruc. Cler. K. B.* 138.

on the part of the plaintiff; and this you are not to omit, upon pain of 100*l.* dated the day of in the eighth year of the reign of our ſovereign lord *George* the third, by the grace of God, king of *Great Britain*, *France* and *Ireland*, defender of the faith, &c. and in the year of our lord 1767.

By the court.

When the writ of inquiry is executed, and returned by the ſheriff, you give a rule for judgment as on a *poſtea*, and when that is out you get the inquiſition ſtamped with a double half-crown ſtamp, tax your coſts *de incremento* thereon, and enter up final judgment; of which ſee hereafter.

When judgment, though regular, may be ſet aſide.

If a judgment be ſtrictly regular, yet if the plaintiff has not loſt a trial, the court has in many inſtances, upon payment of coſts, pleading to iſſue, and accepting notice of trial within the term, ſet aſide ſuch judgment, that the merits of the cauſe might be tried.

Advantage of irregularities to be taken as ſoon as they happen. Andrews 16.

If there be irregularity in the proceſs, or any of the proceedings before or after judgment, it behoves the attorney for the defendant, if he has a mind to take advantage of it, to apply to the court as ſoon as the irregularity happens; for in many caſes where the defendant, after an irregularity has lain ſtill, and let the plaintiff proceed, and be at great expence, and then has come and complained of it, the court has refuſed to aſſiſt him, as ſuch practice proceeds from a deſign to put the plaintiff to unneceſſary charge, or to delay the ſuit, and ought to be diſcouraged.

Many

Many times the defendant, when firſt arreſted, will on time given him for payment of the debt, or on other terms give a warrant of attorney for confeſſing judgment. But *note*; no warrant of attorney for confeſſing a judgment executed by any perſon in cuſtody of any ſheriff or other officer, ſhall be of any force, unleſs ſome attorney for and on behalf of ſuch perſon in cuſtody, and expreſly named by him, be preſent to inform him of the nature of ſuch warrant, which attorney ſhall ſubſcribe his name as a witneſs to the due execution thereof. *Eaſter* 15 *Car.* 2.

Warrant of attorney to confeſs judgment by a perſon in cuſtody not binding, unleſs his attorney preſent. 2 Str. 902.

If the defendant is arreſted, and in execution, and one becomes bound for him to the plaintiff, and the defendant gives him judgment for his counter-ſecurity, it is good tho' no attorney be preſent; and it is not within the common rule of the court, becauſe it was not given to the perſon himſelf, (in which caſe there muſt be an attorney preſent) but to a third perſon. 5 *Mod.* 144. 1 *Salk.* 402. 6 *Mod.* 85, 163. 1 *Mod.* 1. *Comb.* 76, 224.

When an attorney's preſence is not neceſſary.

The reaſon of the rule, that the attorney of the defendant being under confinement, ſhall be preſent when he gives a warrant to confeſs judgment, is to avoid all practices on the part of the plaintiff, and to ſee that it is done without dureſs of impriſonment. But the ſaid cauſe fails here, where the defendant is not in priſon at the plaintiff's ſuit, nor abuſed by any artifice uſed by him. 2 *R. Raym.* 797.

The

Presence of an attorney of another court sufficient.

The court held, that the presence of an attorney of *C. B.* at the execution of a warrant to enter up judgment in *B. R.* was sufficient. 1 *Str.* 530.

There must be an attorney for the defendant present.

The court taking notice of great inconveniencies following from holding a warrant to confess judgment by one in custody to be good, if any attorney (tho' for the opposite party) was present; made a rule, that for the future there should be an attorney present on the behalf of the defendant. *Regula generalis Pas.* 4 *G.* 2. 2 *Str.* 902.

One in execution may confess a new judgment without the presence of an attorney.

The defendant being taken upon a *ca. sa.* paid part of the debt, and gave a warrant of attorney to confess a new judgment for the rest, upon time given him to pay it. This was moved to be set aside, because no attorney was present on the part of the defendant when the warrant was executed, according to the two standing rules of *Car.* 2. and 4 *Geo.* 2. the first of which indeed speaking of persons in custody on arrests, may extend only to mesne process; but the second is general, and relates to any sort of custody. But the court held the warrant of attorney to be well given, for the defendant had a benefit by it in gaining time, and the second rule must be construed *being in custody as aforesaid*, the only intent of that being, to make it necessary to have an attorney *on the part of the defendant*, whereas under the former rule, an attorney for the plaintiff (who was not likely to advise the defendant for the best) was sufficient. 2 *Str.* 1245.

5 Mod. 144.

The

The court ſet aſide a judgment entered upon a warrant of attorney given in *Ireland*, by the defendant whilſt in cuſtody on meſne proceſs at the ſuit of the plaintiff, becauſe no attorney was preſent at the giving it, according to the rule, 4 *Geo.* 2. And ſaid that it was an univerſal rule, and this plaintiff, if he would make uſe of this court, muſt conform to its rules; comparing it to the caſe of ſtamping foreign deeds before they can be read here. 2 *Str.* 1247.

Warrant of attorney executed abroad muſt be conformable to the above rules.

A man gives a warrant of attorney to confeſs a judgment, and dies before the judgment is confeſſed, this is a countermand. 1 *Vent.* 310. But if the party die in the vacation, the attorney may before the eſſoin-day of the ſubſequent term enter up the judgment as of the precedent term. 2 *R. Raym.* 766. *Salk.* 87. *Fareſt.* 2, 93. 2 *Str.* 718, 882, 1081. *Andr.* 53. *Barnard. K. B.* 357, 358, 404.

When party's death a countermand.

If a feme ſole gives a warrant of attorney to confeſs a judgment, and marries before it be entered, the warrant is countermanded; and judgment ſhall not be entered againſt huſband and wife, for that would charge the huſband. *Paſch.* 9 *W.* 3. *B. R. Anonymus, Salk.* 117, 399. *Sed. Q.* If the judgment can be entered up ſo as to be a judgment at the time when ſhe was ſole, though really ſigned after the marriage.

Warrant by a feme ſole countermanded by her marrying.

A feme covert, who lived and acted as a feme ſole, gave a warrant of attorney to confeſs judgment, &c. and afterwards moved to ſet the judgment aſide, becauſe ſhe was covert. The court would not relieve her, but put her

Feme covert living as a feme ſole, gives a warrant, not relievable but by error.

to her writ of error. *Mich.* 10 *W.* 3. *B. R. Anonymus, Salk.* 400.

Of a warrant to enter up a judgment of the precedent term.

If a warrant of attorney be given after the continuance-day, to enter up a judgment as of the term preceding, this may be well enough, if it be dated within the term; but it cannot be so, if such a warrant be given to confess a judgment generally, and dated after the term. 1 *Vent.* 113.

Judgment to be entered of term mentioned in warrant of attorney. How if no term mentioned, or a particular term, or any term subsequent thereto.

Where a warrant of attorney is given for confessing a judgment to be entered of a certain term therein mentioned, judgment can be entered only of that term. *Vide* 1 *Mod.* 1.

If the warrant be to confess judgment generally, without expressing any particular term, or does express that it be entered of a particular term, or any term subsequent to it, judgment may be entered of any subsequent term; but if not entered within the first four terms next after the date of the warrant, the court must be moved for leave to enter the judgment upon affidavit made of the due execution of the warrant of attorney, and that both parties are living, and the debt or part thereof is unsatisfied; if entered otherwise, the court on motion will set it aside.

Judgment by cognovit actionem & dampna *to save charges of inquiry.*

The defendant often after declaration will, on a stay of execution for a time, give judgment by *cognovit actionem*, and in case of trespass, *&c.* to save a writ of enquiry, admit damages by under-writing the declaration thus: 'I acknowledge this action, and 'admit that the plaintiff *A. B.* has sustained 'damages to 50*l.* [according as the sum is.] But in this case I think the defendant's attorney should be present, and a witness.

Of entering judgments.

Every judgment in debt, caſe, covenant, treſpaſs, trover, and every other action, is to be entered fairly on the roll, or an *incipitur* thereof, before ſuch judgment ſhall be ſigned by the ſecondary, or any judge of this court, and the names of the plaintiff and defendant, with the county where the action is laid, and the nature of the action with the attorney's name are to be entered on the book kept by the ſecondary for that purpoſe. *Mich.* 5 *Annæ.*

Judgments or incipiturs thereof to be entered on the roll before ſigned.

All iſſues and judgments ought to be entered on the rolls in a full fair hand, with a large margin of an inch at leaſt, and a convenient diſtance at the top [of about nine inches, the breadth of the roll] for binding up the ſame, and at the bottom, that the writing be not rubbed out. *Hil.* 1657.

How judgments ought to be entered on the roll.

Warrants of atttorney for plaintiff and defendant ought to be * entered on every judgment-roll before the entry of the judgment, otherwiſe ſuch roll not to be filed. *Eaſter* 4 *Jac.* 2.

Warrants of attorney to be entered.

You

* *Holt* ch. j. The entry upon the roll is not the warrant of attorney, but only a memorandum of it, which entry was introduced *tempore Jac.* 2. when *Wright* was chief juſtice. Heretofore they were upon a roll by themſelves, and ſo they ought to be now. *Mich.* 11 *W.* 3. *B. R. Cremer* v. *Wicket*, 1 *R. Raym.* 509. *Salk.* 88. 2 *R. Raym.* 895. *Carth.* 517.

You begin your entry thus:

As yet of Michaelmas *term* [*as the term is.*]
Witneſs William *Lord* Mansfield.

Warrant of attorney for the plaintiff.

London. *A. B.* putteth in his place *E. F.* his attorney, againſt *C. D.* in a plea of treſpaſs upon the caſe [*according as the action is, and if the defendant be deſcribed by an* alias dict' *in the declaration, or he or the plaintiff be an executor or adminiſtrator, he muſt be ſo mentioned in the warrant.*]

Warrant of attorney for the defendant.

London. *C. D.* putteth in his place *G. H.* his attorney, againſt *A. B.* in the plea aforeſaid.

On a verdict in London.

London. Be it remembered, That [*here enter the memorandum and declaration, according to the directions before given.* fol. 231, 233, *&c.*]

[*If it be a judgment on a verdict, you enter to the end of the iſſue, viz.* The ſame day is given to the parties aforeſaid, at the ſame place, [*then go on thus*] Afterwards the proceſs thereof, is continued between the parties aforeſaid, of the plea aforeſaid, by the jury aforeſaid being reſpited between them before our lord the king at *Weſtminſter*, until next after [*the return of the* diſtringas] unleſs * the king's right truſty and well beloved *William* lord *Mansfield*, his majeſty's chief juſtice aſſigned to hold pleas before the king

* *If at the aſſiſes, ſay the juſtices of our lord the king, aſſigned to take*

king himſelf, ſhall firſt come, on the day of at † the *Guildhall* of the city of *London*, according to the form of the ſtatute in ſuch caſe made and provided, for default of the jurors, becauſe none of them did appear; at which day, before our lord the king at *Weſtminſter*, the aforeſaid *A. B.* comes by the ſaid *E. F.* his attorney aforeſaid; and ‖ the ſaid chief juſtice, before whom, *&c.* hath ſent hither ‖‖ his record had ‖‖‖ in theſe words, to wit, Afterwards, that is to ſay, on the day, and at the place within contained before ** *William* lord *Mansfield*, the chief juſtice within written, —— *Robley*, gentleman, being aſſociated unto the ſaid chief juſtice, by force of the ſtatute in that caſe made and provided, the within named *A. B.* comes by his attorney within contained, and the within named *C. D.* although ſolemnly demanded, comes not, but hath made default: Therefore let the jurors of the jury within mentioned be taken againſt him by default; and the jurors of that jury having been ſummoned come, who being choſen, tried and ſworn to declare the truth of the iſſue within contained, upon their oath ſay, That the within named *C. D.* did undertake in manner and form as the within named *A. B.* within complains againſt him, and aſſeſs the damages of the ſaid *A. B* by occaſion of the not performing the promiſes and undertakings within mentioned, over and above his coſts and charges by him about his ſuit in this behalf expended to and for thoſe coſts and charges, to Therefore it is conſidered,

the aſſiſes in the county aforeſaid, ſhall firſt come.

† *The place they are held at.*

‖ *The ſaid juſtices of our ſaid lord the king.*

‖‖ *Their* Poſtea.

** *Sir* R. A. *knight, one of the barons of our lord the king's* Exchequer, *and Sir* E. W. *knt. one of the juſtices of our lord the king, aſſigned to hold pleas before the king himſelf, juſtices of our lord the king, aſſigned to take the aſſiſes in the ſaid county of —— by force of the ſtatute, &c. came the within named.*

Verdict for the plaintiff on non aſſumpſit.

Judgment signed the day of 1759.

sidered, that the said * *A. B.* recover against the said *C. D.* his said damages by the said jury in form aforesaid assessed, and also for his said costs and charges, by the court of our said lord the king now here adjudged of increase to the said *A. B.* by his assent, which damages in the whole amount to and the said *C.* † in mercy, *&c.*

Costs de incremento.

How to enter continuances.

If the cause be not tried within the term next after the term in which the issue was joined, you must continue the *venire* on the roll by *vic' non misit breve*; as suppose an issue joined in *Hilary* term, and tried in the sittings after *Easter*; after the words, "The "same day [*the return of the first* venire *some* "*day in* Hilary] is given to the parties afore-"said, at the same place", say, "at which "day, before our lord the king at *Westmin-*"*ster*, came the parties aforesaid, by their "attornies

* Error of a judgment in *B. R.* in *Ireland*, where *Robert Meredith* was plaintiff, and that judgment was entered, *quod pred' Carolus Meredith recuperet.* And the court held it amendable as the default of the clerk, though in the judgment, the misprision being only in the name, which was right in the rest of the record that was before the court, and should have directed him. 1 *Vent.* 217.

† The not entering the words *misericordia* or *capiatur*, or putting the one for the other, is helped by the *stat.* 16 & 17 *Car.* 2. *c.* 8.

Since *stat.* 5 & 6 *W.* & *M. c.* 12. which takes away the *capiatur fine* in actions *vi & armis*, no judgment of *capiatur* shall be entered against the defendant, nor any thing in lieu thereof, but that clause shall be totally left out of the judgment. *Mich.* 8 *W.* 3. *B. R. Linsey* v. *Clerke*, *Carth.* 390.

" attornies aforesaid, and the sheriffs of *London* did not return the said writ, nor did they do any thing thereupon: Therefore let a jury (*as before*) come before our lord the king at *Westminster*, on next after [*the first day of* Easter *term*] and who are in no wise of kin either to the said *A. B.* or to the said *C. D.* to take cognizance upon their oath of the whole truth of the premisses; because as well the said *C. D.* as the said *A. B.* have put themselves upon that jury. The same day is given to the parties aforesaid, at the same place. Afterwards, the process being continued between the parties aforesaid, of the plea aforesaid, by the jury being respited between them before our lord the king at *Westminster*, until next after [*the first day of* Trinity *term, being the return of the* distringas] then next following, unless the king's right trusty, &c. (*as before.*")

By vic' non misit breve.

New Venire *awarded.*

And in this manner, in case there should be several terms between the term in which your issue is joined, and the term in which it is tried, you continue awarding *venires* on the roll from term to term, on the suggestion that the sheriff does not return the writs, to the term the *distringas* is sued out, which should bear teste the day of the return of the *venire.*

You may enter your issues on both sides the roll, but should not write too near the bottom on the first side, where you are to

write the number-roll and chief clerk's name thus,

Roll 526. *Lee.*

And when you have occaſion to write on the back-ſide, you begin over againſt the firſt line of your memorandum, leaving at leaſt an inch margin.

Judgment againſt the defendant on verdict in debt.

It is therefore conſidered, that the ſaid *Edward* recover againſt the ſaid *Thomas* his ſaid debt, and the aforeſaid damages by the ſaid jury in form aforeſaid aſſeſſed, and alſo eighteen pounds for his ſaid coſts and charges by the court of our ſaid lord the king now here adjudged of increaſe to the ſaid *Edward* by his aſſent, which damages in the whole amount to

On a demurrer in abatement to a declaration.

And the ſaid *Richard* and *Cadogan*, by *L. R.* their attorney, come and defend the force and injury, *&c.* and pray judgment of the ſaid declaration, becauſe they ſay, That the ſaid declaration, and the matter contained therein, are not ſufficient in law to maintain the ſaid action of the ſaid *John*, *James* and *Mary*, againſt them the ſaid *Richard* and *Cadogan*; to which ſaid declaration they the ſaid *Richard* and *Cadogan* have no need, nor are they obliged by the law of the land to anſwer; and this they are ready to verify: Wherefore for want of a ſufficient declaration in this caſe, the ſaid *Richard* and *Cadogan* pray judgment of the ſaid declaration, and that the ſaid declaration may be quaſhed, *&c.*

And

And the said *John*, *James* and *Mary* say, that the said declaration, and the matter therein contained, are sufficient in the law for them the said *John*, *James* and *Mary* to maintain their said action against the said *Richard* and *Cadogan*, which said declaration, and the matter therein contained, the said *John*, *James* and *Mary* are ready to verify and prove, as the court, *&c.* Wherefore, for that the said *Richard* and *Cadogan* do not deny the said matter in the said declaration, nor make any answer thereto, the said *John*, *James* and *Mary* pray judgment, and their damages by occasion of the premisses to be adjudged to them, *&c.* And because the court of our said lord the king now here is not yet advised about giving judgment of and concerning the premisses, day is therefore given to the said parties to come before our lord the king at *Westminster*, on next after to hear judgment of and upon the same premisses, for that the court of our said lord the king, now here, is not yet advised thereof. At which day, before our said lord the king at *Westminster*, came the said parties by their attornies aforesaid; upon which, all and singular the said premisses being seen, and by the court of our said lord the king now here fully understood and considered, and mature deliberation being had thereupon; it appears to the court of our said lord the king, now here, that the said declaration, and the matter therein contained, are sufficient in law for them the said *John*, *James* and *Mary* to maintain their said action against the said *Richard* and *Cadogan*; where-

Joinder.

Continuance by curia advisare vult.

Interlocutory judgment for the plaintiff.

fore the ſaid *John*, *James* and *Mary* ought to recover their damages againſt the ſaid *Richard* and *Cadogan*, by occaſion of the premiſſes aforeſaid. But becauſe it is unknown to the court of our ſaid lord the king, now here, what damages they the ſaid *John*, *James* and *Mary* have ſuſtained by occaſion of the premiſſes; therefore it is commanded to the ſheriff of *Middleſex*, that by the oath of twelve good and lawful men of his bailiwic he diligently inquire what damages they the ſaid *John*, *James* and *Mary* have ſuſtained, as well by occaſion of the premiſſes, as for their coſts and charges by them about their ſuit in this behalf expended; and that he ſend the inquiſition, which, *&c.* to our lord the king at *Weſtminſter*, on next after under the ſeal, *&c.* and the ſeals, *&c.* together with the writ of our ſaid lord the king to him thereupon directed, *&c.* The ſame day is given to the ſaid *John*, *James* and *Mary*, at the ſame place, *&c.*

Inquiry awarded.

See after for entry of the return of the inquiry and final judgment thereon.

Judgment by cognovit actionem & damna, *to ſave the charges of executing an inquiry.* Lilly's Ent. 470. Clift's Entr. 422.

And the ſaid *William*, by *Robert Bicknell* his attorney, comes and defends the force and injury, when, *&c.* and ſays, that he cannot deny the ſaid action of the ſaid *John*, nor but that he the ſaid *William* undertook in manner and form as the ſaid *John* above complains againſt him; nor alſo but that the ſaid *John* has ſuſtained damages by occaſion of the not performing the ſaid promiſes and undertakings, to 57*l.* 4*s.* 6*d.* as the ſaid *John* has

has by his declaration above ſuppoſed; and upon this the ſaid *John* prays judgment, and the ſaid damages ſo acknowledged, together with his coſts and charges by him about his ſuit in this behalf expended, to be adjudged to him, *&c.* Therefore it is conſidered, that the ſaid *John* recover againſt the ſaid *Richard* his ſaid damages, to 57*l.* 4*s.* 6*d.* above acknowledged; and alſo ſix pounds for his ſaid coſts and charges, by the court of our ſaid lord the king now here adjudged to the ſaid *John* by his aſſent; which ſaid damages in the whole amount to 63*l.* 4*s.* 6*d.* And the ſaid *William* in mercy, *&c.*

Judgment in debt by non ſum informatus, *without an imparlance.*

And the ſaid *Benjamin*, by *Thomas Owen* his attorney, cometh and defendeth the force and injury, when, *&c.* and the ſaid *Andrew* prayeth, that the ſaid *Benjamin* may anſwer to his ſaid declaration; upon which the ſaid attorney of the ſaid *Benjamin* ſaith, that he is not informed by the ſaid *Benjamin* of any anſwer to be given for the ſaid *Benjamin* to the ſaid *Andrew* in the premiſſes; nor doth he ſay any thing elſe in bar or preclusion of the ſaid action of the ſaid *Andrew*, by which the ſaid *Andrew* remaineth thereof undefended againſt the ſaid *Benjamin*, *&c.* Therefore it is conſidered, that the ſaid *Andrew* recover againſt the ſaid *Benjamin* his ſaid debt, and alſo ſixty and three ſhillings for his (*a*) damages which

Judgment ſigned the — day of — 1738.

(*a*) Error of a judgment in *C. B.* by *nil dicit* upon an old bill obligatory. The prothonotary has taxed 50*l.* for intereſt and damages. The judgment was *ideo conſ. eſt quod præd' J. recuperet verſus præd H. debitum ſuum præd'*

he hath ſuſtained, as well by occaſion of the detaining that debt, † as for his coſts and charges by him about his ſuit in this behalf expended, by the court of our ſaid lord the king now here adjudged to the ſaid *Andrew* * by his aſſent. And the ſaid *Benjamin* in mercy, &c.

And

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præd' et damna ſua occaſione detentionis debiti illius ad 50*l. eidem J. ex aſſenſu ſuo per curiam adjudicat'*. Exception; The court of *C. B.* have taxed damages *occaſione detentionis debiti*, where ſuch damages do not appear judicially to the court; but theſe damages ought to be inquired by a jury upon a writ of inquiry. *Sed non allocatur*; for the courſe and practice of both courts is, upon a judgment in debt upon default or confeſſion, to tax the damages *occaſione detentionis debiti*, as well as the coſts of ſuit; and this being by the aſſent of the plaintiff, which is always entered upon the record, ſhall conclude the defendant; but if the plaintiff will not aſſent to it, then he ſhall have a writ to enquire of the damages *occaſione detentionis debiti*, if he will; but this is in the election of the plaintiff, and not of the defendant; and if the court by the aſſent of the plaintiff may tax 20*s.* for the damages *occaſione detentionis debiti illius*, by the ſame reaſon they may tax 20*l.* if they ſee cauſe: Wherefore the exception was over-ruled. *Trin.* 21 *Car.* 2. *B. R. Holdip* v. *Otway*, 2 *Saund.* 106. 2 *Keb.* 624, 625. 2 *Danv. Abr.* 449. *p.* 5. 1 *Vent.* 71. 1 *Sid.* 442. *Lat.* 113. *Yelv.* 152. 1 *Brownl.* 214, 215. 3 *Leon.* 213. *Dyer* 105. *Cro. Jac.* 415. 1 *Rol. Abr.* 571. *J.*

† In *C. B.* the words *quam pro viſis et cuſtagiis ſuis per ipſum circa ſectam ſuam in hac parte appoſitis* are always omitted.

* *Vide ſupra* note (*a*). Debt on a bond in *B. R.* plea in bar, demurrer thereto, and judgment for the plaintiff, in which the words *ex aſſenſu ſuo* were omitted. A writ of error being brought in the *Exchequer* chamber, the juſtices and barons ſeemed ſtrongly of opinion, that by

And the ſaid *Charles* in his proper perſon comes and defends the force and injury, when, &c. and prays leave to imparle to the ſaid bill; and it is granted to him, &c. And upon this, day is given to the parties aforeſaid, before our lord the king at *Weſtminſter*, until next after [*the day the rule to plead is out*] to wit, to the ſaid *Charles* to imparle, and then to anſwer, &c. At which day, before our lord the king at *Weſtminſter*, comes the ſaid *Anthony* by his attorney aforeſaid; and the ſaid *Charles* at that day, though ſolemnly demanded, comes not, nor does he ſay any thing in bar or preclusion of the ſaid action of the ſaid *Anthony*, by which, &c. [*as in the laſt to the end.*]

Nil dicit *in debt of the ſame term.* Townſ. Prepar. to pleading 498. Lilly's Ent. 473.

And now at this day, to wit, on next after [*the firſt day of the term judgment is entered*] in this ſame term, until which day the ſaid *Charles Danvers* had leave to imparle to the ſaid bill, and then to anſwer thereunto, &c. before our lord the king at *Weſtminſter*, the ſaid *Andrew Baker* came by his attorney aforeſaid; and the ſaid *Charles Danvers*, although at the ſame day ſolemnly demanded, came not, nor does he ſay any thing

Nil dicit *in debt, with an imparlance.*

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by reaſon of this omiſſion the judgment was erroneous; whereupon the judgment was amended in *B. R.* and the tranſcript afterwards in the *Exchequer* chamber. *Paſch.* 3 *Geo.* 2. *Tully* v. *Sparkes*, 2 *R. Raym.* 1570. *Stat.* 16 & 17 *Car.* 2. *c.* 8.

thing in bar or preclusion of, &c. [*as before to the end.*]

Nil dicit *in case of the same term with the declaration.*

And the said *Edward*, by *A. B.* his attorney, comes and defends the force and injury, when, &c. And the said *Abraham* prays that the said *Edward* may answer to his said declaration; and upon this the said *Edward* prays leave to imparle to the said bill of the said *Abraham*, until next after [*the day the rule is out*] and it is granted to him, &c. The same day is given to the said *Abraham*, at the same place, &c. At which day, before our lord the king at *Westminster*, came the said *Abraham* by his attorney aforesaid; and the said *Edward* at that day, though solemnly demanded to answer, came not, nor doth the said attorney of the said *Edward* say any thing in bar or preclusion of the said action of the said *Abraham*, by which the said *Abraham* remains thereof undefended against him, &c. Wherefore the said *Abraham* ought to recover against the said *Edward* his damages by occasion of the premisses; but because it is unknown to the court of our lord the king now here, what damages the said *Abraham* has sustained in this case by the occasion aforesaid; therefore it is commanded to the sheriff, that by the oath of twelve good and lawful men of his bailiwic he diligently inquire what damages the said *Abraham* has sustained, as well by occasion of the premisses, as for his costs and charges by him about his suit in this behalf expended, and that he send the inquisition which he shall thereupon take, to our lord the king

Inquiry awarded. Co. Entr. 24. a.

king at *Weſtminſter*, on next after [*the return*] under his ſeal, and the ſeals of thoſe by whoſe oath he ſhall take the ſaid inquiſition, together with the writ of our ſaid lord the king to him thereupon directed *. The ſame day is given to the ſaid *Abraham*, at the ſame place. At which day, *The return.* before our lord the king at *Weſtminſter*, came the ſaid *Abraham* by his attorney aforeſaid; and the ſheriff, to wit, *A. M.* eſq; ſheriff of the ſaid county of returned a certain inquiſition taken before him at in the ſaid county of on the day of in the year of the reign of our ſovereign lord *George* the third, now king of *Great Britain*, *&c.* by the oath of twelve good and lawful men of his bailiwic; by which it is found, that the ſaid *Abraham* has ſuſtained damages by occaſion of the premiſſes, over and above his coſts and charges by him about his ſuit in this behalf expended, to one hundred pounds; and for thoſe coſts and charges, to forty ſhillings. Therefore it *Judgment* is conſidered, that the ſaid *Abraham* recover *ſigned the— day of —* againſt the ſaid *Edward* his damages afore- 1767. ſaid,

* Error aſſigned on a judgment in *C. B.* for that upon the writ of inquiry the plaintiff had no day given him in court, and no day was given to the defendant then to appear. 8 *H.* 7. *rot.* 29. *Lib. intr.* 273. Over-ruled, for the courſe of the *Common Pleas* is to give no day. *Cro. Eliz.* 75. The defendant is not to have day, and the plaintiff is to attend at his peril; and ſo is the courſe of the *Common Pleas*, but it is otherwiſe in the *King's Bench*. Cro. Eliz. 144. Vide Cro. Car. 236. Vide 2 D. A. 153. p. 7.

ſaid, by the ſaid inquiſition above found; and alſo fourteen pounds nineteen ſhillings and ſix pence for his ſaid coſts and charges, by the court of our ſaid lord the king now here adjudged of increaſe to the ſaid *Abraham* by his aſſent, which damages in the whole amount to one hundred and ſixteen pounds nineteen ſhillings and ſixpence. And the ſaid *Edward* in mercy, &c.

Nil dicit *in caſe with an imparlance.*

And now at this day, to wit, next after [*the firſt day of the term judgment is entered*] in this ſame term, to which day the ſaid *Chriſtopher Denton* had leave to imparle to the ſaid bill, and then to anſwer, &c. before our lord the king at *Weſtminſter*, the ſaid *Evan Thomas* comes by his attorney aforeſaid, and prays that the ſaid *Chriſtopher Denton* may anſwer his ſaid declaration; and the ſaid *Chriſtopher Denton*, altho' at the ſame day ſolemnly demanded, comes not, nor does he ſay any thing in bar or preclusion of the ſaid action of the ſaid *Evan*, by which the ſaid *Evan Thomas* remains thereof undefended againſt him: Wherefore the ſaid *Evan Thomas* ought to recover againſt the ſaid *Chriſtopher Denton* his damages by * occaſion of the premiſſes. But becauſe, &c. (*as before.*)

* If in treſpaſs you ſay, by occaſion of the ſaid treſpaſs.

If in aſſault, by occaſion of the ſaid treſpaſs and aſſault.

If in treſpaſs, aſſault and impriſonment, by occaſion of the ſaid treſpaſs, aſſault and impriſonment.

If

If in covenant, by occaſion of breaking the ſaid covenant.

If in *aſſumpſit*, by the occaſion of not performing the ſaid promiſſes and undertakings.

No plea-roll to be filed after the term following that, which it ought to be filed of.

No plea-roll to be filed after the end of the term next following that of which it ought to be filed, unleſs by a rule of court. *Eaſter* 9 *W.* 3.

Time for filing rolls. Andrews 22. *Vide* Salk. 87. 2 R. Raym. 850.

Every attorney ought to bring into the office all his rolls fairly ingroſſed by the times limited by former rules, *viz. Mich.* 9. and *Trin.* 10 *W.* 3. that is to ſay, his rolls of *Trinity*, *Michaelmas* and *Hilary* terms before the eſſoin-day of every ſubſequent term, and his rolls of *Eaſter* term before the firſt day of *Trinity* term. *Mich.* 5 *Annæ.*

But the *cuſtos brevium*, in indulgence of the clerks, attends the day but one before every term, to receive and file the rolls. He uſed formerly to attend the day before *Trinity* term for that purpoſe, but now only the day but one before *Trinity* term to receive and file their rolls.

Judgment to be revived by ſci. fa. *if no execution within a year.*

If no execution be ſued out within a year after judgment is obtained, the judgment muſt be revived by *ſcire facias*; and the plaintiff may, at any time within a year after judgment on the *ſcire facias*, ſue forth any execution, and continue the ſame on the roll on which the *ſcire facias* is entered; but if he doth not take out execution within the year, the judgment muſt be again revived by *ſcire facias*, as at firſt; and the reaſon is in order to prevent a ſurprize upon the defendant:

But this rule does not hold, where the defendant himſelf hath affected the delay; ſo far from it, that the defendant's rule to ſhew cauſe why ſuch an execution ſhould not be ſet aſide, was diſcharged even with coſts. 2 *Bur. Rep.* 660.

Judgment entered 10 *years, ſci. fa. to be moved for.*

If a judgment has been entered ten years, and no execution taken out, the plaintiff cannot ſue out a *ſcire facias* to revive it without leave of the court.

Execution ſued out and continued on the roll as effectual as ſci. fa.

Upon a judgment obtained, and all parties living, if a *fi. fa. ca. ſa.* or *elegit*, be ſued out within the year, and returned and entered upon the roll, the ſame may be continued down from term to term to the time of the execution thereof, although after the year, and ſhall be as good as if the judgment had been revived by *ſcire facias.*

Judgment may be entered if defendant dies after day in bank.

If the defendant appear and imparle until the firſt day of the next term, and die after the day in bank, yet if a rule be given for anſwer, and no plea be pleaded, judgment may be entered againſt him that next term by default, as of the firſt day of the term. *Stat.* 17 *Car* 2. *c.* 8. *Salk.* 401. 1 *R. Raym.* 695. 2 *R. Raym.* 766, 849.

Of executions.

Executions.

THERE are three ſorts of executions, *viz.* a *capias ad ſatisfaciendum* againſt the body, a *fieri facias* againſt the goods and chattels, and an *elegit* againſt the goods and chattels, (except the oxen and beaſts of the plough)

plough) and againſt one moiety of the defendant's lands and tenements.

Executions at the common law.

The body or lands of the defendant were not, at the common law, liable to an execution upon a judgment for debt or damages, unleſs in ſome ſpecial caſes, the execution was only of his goods, chattels, grain, or other preſent profits growing on his land. 3 *R.* 11. *b.* For this purpoſe the common law gave two writs only, as the *levari facias*, by which the ſheriff was commanded *quod de terris & catallis ipſius* A. *&c. levari faciat, &c.* and the *fieri facias*, which was only *de bonis & catallis.* 3 R. 12. a. The law abhorred force, and when committed, the body of the offender was ſubject to impriſonment: and it was a rule, that in actions *vi & armis* a *capias* lay, and where a *capias* lay in proceſs, a *capias ad ſatisfaciendum* lay after judgment, 3 *R.* 12. *a.* but ſuch actions *vi & armis* muſt be intended where there was a direct and wilful wrong, not where a negligence only, as againſt an hoſt for goods loſt in his inn. *Hob.* 56. Several ſtatutes have given a *capias* in proceſs, and conſequently a *capias ad ſatiſfaciendum* after judgment.

Ca. ſa.

By the ſtatute of *Marlbridge*, 52 *H.* 3. *c.* 23. a *capias* is given in account. 2 *Inſt.* 143. By the ſtatute of *Weſtminſter* 2. 13 *Ed.* 1. *c.* 11. a *capias* lies in account and outlawry thereon. 2 *Inſt.* 978. By the ſtatute of 25 *Edw.* 3. *c.* 17. a *capias* is given in debt and detinue. By the *ſtat.* 19 *H.* 7. *c.* 9. like proceſs is given in caſe as in debt and treſpaſs. By the ſtatute of 23 *H.* 8. *c.* 14. like proceſs is given in a writ of annuity and covenant as in caſe.

By

Elegit.

By the ſtatute of *Weſtminſter* 2. *c.* 18. the *elegit* was given, and by that ſtatute, when a debt is recovered or acknowledged in the king's court, or damages awarded, it ſhall be in the election of him that ſues to have a writ of *fieri facias*, that the ſheriff levy of the lands or goods, or that the ſheriff deliver to him all the chattels of the debtor, ſaving his oxen and beaſts of the plough, and one half of his lands, 'till the debt be levied by a reaſonable price and extent.

If the chattels are ſufficient, then the ſheriff ought not to extend the land. 2 *Inſt.* 395. The appraiſement and extent muſt be by inquiſition. 2 *Inſt.* 396. The ſheriff cannot ſell goods upon an *elegit* without taking an inquiſition. *Cro. El.* 584.

When a bad return of a writ of elegit *may be quaſhed without a writ of error.*

Hopkins having obtained a judgment, ſued out an *elegit*, and the inquiſition finding the defendant ſeiſed of a meſuage, and other lands of ſuch a value, the ſheriff delivers a moiety of the meſuage, *&c.* in execution, and the plaintiff moved to quaſh the return, to the end he might have a new writ, for he could not bring his ejectment upon this return, becauſe the ſheriff had not delivered the moiety by metes and bounds, as he ought to have done. *Twiſden* and *Wild* ſaid, that after it is filed and entered upon the roll, it cannot be quaſhed nor diſcharged but by writ of error, and ſo the cauſe of the diſcharge will be marked upon the roll, and now the plaintiff has excluded himſelf from any other execution. But *Hale* ſaid, that where the cauſe appeared with the record itſelf, it might be quaſhed without a writ of error; and here

it

it appears, that the ſheriff has not delivered the moiety in ſeveralty as he ought; and if the inquiſition had found the defendant ſeiſed of two meſuages, one of 20 *l. per annum*, and the other of 25 *l. per annum*, and the ſheriff delivers one of them as the moiety, and the return is filed and entered upon the roll, yet it may be quaſhed without a writ of error; for it is apparent within the return, that the ſheriff has delivered either more or leſs than a moiety. But if the ſheriff upon an *elegit* delivers three parts of four in extent for a moiety, and returns the delivery of a moiety, here this return cannot be quaſhed nor avoided, if once filed, for he cannot ſhew it ſo as to take advantage of it upon the trial; but the party, in caſe where more than a moiety is delivered, muſt come before the writ filed, and ſuggeſt inequality, for elſe it ſhall be taken to be true, becauſe by inquiſition, except the miſ-execution appear within the return itſelf, then it is void, and neither party put to bring his writ of error, and the plaintiff in ſuch caſe may take out a new execution; for this being void, is as if no execution at all had been. But becauſe *Twiſden* and *Wild* doubted, *cur. adviſar. Anonymus*, *Paſch.* 26 *Car.* 2. and 6 *Keble* 313.

If upon an *elegit* the ſheriff deliver the moiety of a houſe without meres and bounds, the return is ill, and ſhall be quaſhed for incertainty; but if the ſheriff upon an *elegit* deliver more than a moiety, the return is not void, but voidable by writ of error or *audita querela*. Trin. 10 W. 3. B. R. Pullen *v.* Birkbeak, Carth. 453.

If

If the ſheriff upon an inquiſition upon an *elegit* returns the defendant to have 20 acres in *Dale*, and 20 acres in *Sale*, and delivers the 20 acres in *Sale* for the moiety of the whole, all is void; for he ought to deliver a moiety of the 20 acres in each vill; and this might be avoided in evidence in ejectment brought for the lands. 1 *Lev.* 160.

If only goods levied on an elegit, *the plaintiff may have a* capias *for the reſidue.* Str. 226.

Upon an *elegit* the ſheriff took an inquiſition, and levied ſome of the defendant's goods in part of the debt, but returned that he had no lands; though 2 *Inſt.* 395. after an *elegit*, the plaintiff cannot have a *capias*. *Per curiam:* It being returned that the defendant had no lands, this is to be conſidered only as a *fieri facias*, and the plaintiff may have a *capias ad ſatisfaciendum*. Mich. 13 Geo. 1. B. R. Lancaſter *v.* Fielder, 2 R. Raym. 1451.

No notice of executing an elegit.

No notice is given of the execution of a writ of *elegit*, as there muſt be of a writ of inquiry. *Trin.* 30 *Car.* 2.

Fi. fa. *iſſued in life of defendant, who dies before the return, it may be executed.*

If a *fieri facias* be ſued out in the life of the defendant, who dies before the return of the writ, yet the goods may be taken in execution upon this writ, be there executor or adminiſtrator, or neither, for the goods were bound by the execution. *Vide Rolls* 893. 3 *Cro.* 174, 181. *Mo.* 21. *Cowper* v. *Dawes*, *Hil.* 20, 21 *C.* 2. *C. B. ſed vide Stirt* v. *Alder*, *Trin.* 22 *Car.* 2.

An adminiſtrator plaintiff ſues out a fi. fa. *and dies after goods ſeiſed to the value of the*

Dives as adminiſtratrix of *J. S.* recovered a judgment in *C. B.* for 340 *l.* againſt *Clerk*, and ſued out a *fieri facias* thereupon directed to the ſheriff of *Middleſex*, who returned that he had ſeized goods to the value of the debt,

and

and that they remained in his hands *pro defectu emptorum*. Afterwards, and before the goods were ſold, *Dives* died, and *Clerk* ſued out a *ſcire facias* to the ſheriff of *Middleſex*, to ſhew cauſe why the goods ſhould not be reſtored to him; as ſuppoſing that now *Dives* is dead, there is no body can have the fruits of the execution. Upon a demurrer to the writ, judgment was given for the defendant, which judgment was afterwards affirmed on a writ of error in *B. R.* *Clerk* was, by this ſeizing of his goods in execution, diſcharged of the judgment. The ſheriff may ſell the goods by authority of law without a *venditioni exponas*, and after his year is expired and he is out of his office. In the caſe of *Cleeve* v. *Veer*, 1 *Cro.* 450, 457. 1 *Jones* 385. there was a further act to be done, *viz.* the awarding a *liberate*. The ſheriff is reſponſible for the value he has returned the goods at, and when the right is come to the adminiſtrator *de bonis non*, the ſheriff ſhall bring the money into court, and upon the adminiſtrator *de bonis non* coming in, and ſhewing his letters of adminiſtration, he ſhall take it out. The return here is a good excuſe, ſo as the ſheriff ſhall not be amerced for not bringing the money into court, yet he muſt ſell the goods in convenient time; for if a *diſtringas* is taken out, he muſt ſell the goods before the return of the writ, or elſe he forfeits iſſues. *Mich.* 3 *Annæ B. R. Clerk* v. *Withers*, 2 *R. Raym.* 1072. *Salk.* 322.

debt, which remained pro defectu emptorum.

Sheriff reſponſible for the value, and the adminiſtrator de bonis non, &c. *ſhall have the money.*

Judgment in *B. R. fieri facias* into *London*, return *nulla bona*, *teſtatum* into *Montgomery-ſhire*,

Execution may enter into Wales.

ſhire, the ſheriff returns *quod breve dom' regis non currit in Wallia niſi in cauſa regis*, or wherein the king is concerned. *Saunders* moved that the ſheriff might be amerced. Reſolved *per curiam*, That upon a judgment in this court, execution may be awarded into *Wales* or a county palatine. *Vide* 2 *Cro.* 484. 1 *Cro.* 445. that lands in *Wales* pleadable here. *Hetley* 18, 20, 21. 2 *Bulſtr.* 54, 156. 2. If the writ did not run there, yet the ſheriff being an officer of this court, ought not to queſtion it, but to make return of the execution of it; and the ſheriff was ordered, upon a penalty, to return the writ as he would ſtand by it; for it was reſolved the ſheriffs in *Wales* ought to execute judicial writs, and the court has none to write to there as in counties palatine, where they write to the chancellor or chamberlain, or warden of the *Cinque Ports*. An *elegit* may be executed in *Wales*, and why not a *fi. fa.*? If it could not, the party would be without remedy; for he cannot bring an action there upon this judgment, and he cannot outlaw the defendant, becauſe this is on a bill of debt againſt an executor. *Draper* v. *Blaney*, *Trin.* 22 *Car.* 2. 1 *Lev.* 291. *Raym.* 206. 2 *Saund.* 193. 2 *Keb.* 649, 657, 724.

Or a county palatine.

Of execution on a joint judgment againſt ſeveral defendants.

Judgment againſt two; one dies, the plaintiff brings a *ſci. fa.* againſt the ſurvivor and the executor of the other defendant; the ſurvivor makes default, and the executor demurs and has judgment becauſe it was held that the perſonal lien ſurvived. *Hale*: Where a judgment is againſt ſeveral, there the lien ſurvives;

ſurvives; for as the land is not bound but in reſpect of the perſon, ſo in that caſe the party dying, his lands are unbound. If judgment againſt two or three, the execution muſt be joint, and not againſt any one; and if three be jointly and ſeverally bound, the party muſt ſue either all or one, and cannot ſue two, becauſe neither joint nor ſeveral; but where ſeveral become bail, there one may be ſued without naming the other, for they are ſeverally bound. *Cary* v. *Ward*, *Paſch.* 26 *Car.* 2. 3 *Keb.* 298.

Where on a penalty being levied, the court will order the plaintiff to take only his principal, intereſt and coſts.

Debt upon bond, againſt the principal, and after againſt the bail, and the whole penalty levied upon the goods of the bail, and the money remaining in the ſheriffs hands; they move, that the plaintiff may accept his principal, intereſt and charges, and return the reſt. The court ſaid the defendants came very late, for they never uſed to make ſuch a rule after execution executed, yet being in caſe of the bail, and the money remaining in the ſheriff's hands, it was granted; but if the ſheriff had paid the money over to the plaintiff, they would not help the defendant. *Anonymus*, *Mich.* 30 *Car.* 2.

Eſcape of the huſband the eſcape of the wife.

Huſband and wife taken in execution, the gaoler let the huſband eſcape; court reſolved, that unleſs the plaintiff would take the huſband again, *as he might do*, they would diſcharge the wife, and ſaid, the eſcape of the huſband was the eſcape of the wife. 1 *Vent.* 51.

Execution may iſſue out of this court into a county palatine. Ante 306.

Motion to have reſtitution of goods levied by *fi. fa.* out of this court in the county palatine

latine of *Cheſter*, denied *per cur.* and held, that executions may well iſſue out of this court to the county palatine on a judgment originally given in this court. 1 *Lev.* 256.

Where two writs of execution are delivered to the ſheriff, he muſt give preference to that which was firſt delivered.

Per Holt, If a *fi. fa.* is delivered to the ſheriff to-day, and another to-morrow, and the ſheriff executes the laſt firſt by making a bill of ſale of the goods, ſuch ſale ſhall ſtand good, and the vendee ſhall hold the goods againſt him who firſt delivered the writ to the ſheriff, and his remedy is only by action againſt the ſheriff.

But if the writs of execution are delivered to the ſheriff the ſame day, he hath not election which to execute firſt, but is bound to give preference to that which was firſt delivered; but if in fact he execute that firſt which was laſt delivered, and make ſale of the goods, the vendee hath a good title to them, which cannot be defeated by a ſubſequent execution of that writ which was firſt delivered. But the party concerned in ſuch writ is put to his action againſt the ſheriff. *Mich.* 9 *W.* 3. *B. R. Smalcomb* v. *Buckingham*, *Carth.* 419. *Vide Statute of Frauds* 29 *Car.* 2. *c.* 3.

Execution againſt an agreement ſet aſide.

Twiſden: I have known where if a judgment was given, and there was an agreement between the parties not to take out an execution 'till the next term, and they did it before, that the court ſet all aſide. 1 *Mod.* 20.

Execution after judgment ſigned, but before it is entered.

The plaintiff may have execution preſently after judgment is ſigned, and before it is entered, for otherwiſe he ſhould be at great delay; for the courſe of the court is not to enter the judgment 'till the vacation after, and the

the defendant is not at any miſchief; for he may have a writ of error after the ſigning, and before the judgment entered. *Mich.* 15 *Jac. Smith* and *Bowles.* 1 *Rol. Abr.* 899. *Vide* 2 *Show.* 494. 3 *Danv.* 329. *M. pl.* 1.

Upon an execution upon a ſtatute-ſtaple, merchant, upon ſtatute of *Acton Burnel*, or 23 *H.* 8. the body of a peer may be taken in execution. 2 *Leon.* 173. 3 *Danv.* 327. 2. *Body of a peer when liable to an execution.*

A ca. ſa. *in debt.*

GEORGE the third, by the grace of God, of *Great Britain*, *France* and *Ireland* king, defender of the faith, &c. To the ſheriff of *Middleſex* greeting. We command you, that you take *C. D.* [*if there be an* alias dict' *put it in*] if he ſhall be found in your bailiwick, and ſafely keep him, ſo that you may have his body before us at *Weſtminſter*, on next after to ſatisfy *A. B.* of one hundred pounds of debt, which the ſaid *A. B.* lately in our court before us at *Weſtminſter* recovered againſt him; as alſo of ſixty-three ſhillings, which in our ſaid court before us at *Weſtminſter* were adjudged to the ſaid *A. B.* for his damages which he ſuſtained as well by occaſion of the detaining the ſaid debt, as for his coſts and charges by him about his ſuit in that behalf expended; whereof the ſaid *C. D.* is convicted, as appears to us of record; and have there then this writ. Witneſs *William* Lord *Mansfield* at *Weſtminſter*, Ca. ſa. *in debt.*

ſter, * the day of in the year of our reign.

Lee.

In caſe. *If in caſe upon promiſe, ſay*, To ſatisfy *A. B.* of one hundred pounds which the ſaid *A. B.* lately in our court before us at *Weſtminſter* recovered againſt the ſaid *C. D.* for his damages which he ſuſtained as well by occaſion of the not performing certain promiſes and undertakings lately made by the ſaid *C. D.* to the ſaid *A. B.* as for his coſts and charges, *&c.*

A teſtatum ca. ſa.

Teſtatum ca. ſa. *in debt.* GEORGE the third, by the grace of God, of *Great Britain*, *France* and *Ireland* king, defender of the faith, *&c.* To the ſheriffs of *London* greeting: Whereas we lately commanded our ſheriff of *Middleſex*, that he ſhould take *C. D.* if he ſhould be found in his bailiwic, and ſafely keep him, ſo that he might have his body before us at *Weſtminſter*, at a certain day now paſt, to ſatisfy *A. B.* of five hundred pounds of debt which the ſaid *A. B.* lately in our court before us at *Weſtminſter* had recovered againſt him, and alſo of ſixty-three ſhillings which lately in our ſaid court before us at *Weſtminſter* had been adjudged

* Judgment of *Hilary* term, and the execution bore teſte the firſt day of that term, and held to be good. 1 *R. Raym.* 695. *Comyns* 117. *Salk.* 50, 88. *Andr.* 308, 309.

adjudged to the ſaid *A. B.* for his damages which he had ſuſtained as well by occaſion of the detaining that debt, as for his coſts and charges by him about his ſuit in that behalf expended, whereof the ſaid *C. D.* is convicted, as appears to us on record; and our ſaid ſheriff of *Middleſex* at that day returned to us, that the ſaid *C. D.* was not found in his bailiwic; whereupon, on the behalf of the ſaid *A. B.* it was ſufficiently atteſted in our ſaid court before us, that the ſaid *C. D.* doth lurk and ſecrete himſelf in your county: We therefore command you, that you take him, if he may be found in your bailiwic, and ſafely keep him, ſo that you may have his body before us at *Weſtminſter*, on next after to ſatisfy the ſaid *A. B.* of the debt and damages aforeſaid; and have there then, *&c.*

Ca. ſa. *by ſurviving executors againſt an executor after* nulla bona *returned on a* fi. fa.

GEORGE the third, by the grace of God, of *Great Britain*, *France* and *Ireland* king, defender of the faith, *&c.* To the ſheriff of *Middleſex* greeting: Whereas by our writ we lately commanded you, that of the goods and chattels, which were of *Lewis R.* gent. deceaſed, lately called *L. R.* of, *&c.* at the time of his deceaſe, in the hands of *Rebecca R.* widow, executrix of the teſtament and laſt will of the ſaid *L. R.* in your bailiwic, you ſhould cauſe to be made two hundred pounds of debt, which *Thomas W. Philip S.* and *Robert R.* ſurviving executors of the teſtament and laſt will of *Gabriel Chalcorines*, gent. deceaſed, lately in our court before us at *Weſtminſter*, had recovered againſt

the ſaid *Rebecca*; as alſo ſixty-three ſhillings, which in our ſaid court before us had been adjudged to the ſaid *T. W. P. S.* and *R. R.* for their damages which they had ſuſtained, as well on occaſion of the detaining that debt, as for their coſts and charges by them about their ſuit in that behalf expended, whereof ſhe was convicted, as appeared to us of record, if ſhe had ſo much in her hands to be adminiſtered; and if ſhe had not ſo much in her hands to be adminiſtered, then the ſaid damages of the proper goods and chattels of the ſaid *Rebecca*; and whereupon in our ſaid court before us, it was conſidered, that the ſaid *T. W. P. S.* and *R. R.* the ſurviving executors of the ſaid *G. C.* ſhould have their execution againſt the ſaid *R.* of the debt and damages aforeſaid to be levied of the goods and chattels which were of the ſaid *L. R.* in the hands of the ſaid *R.* to be adminiſtered, if ſhe had then ſo much in her hands to be adminiſtered; and if ſhe had not then ſo much in her hands, then the ſaid damages to be levied of the proper goods and chattels of the ſaid *R.* and that you ſhould have that money before us at *Weſtminſter*, on *Wedneſday* next after five weeks of *Eaſter*, to render to the ſaid *T. W. P. S.* and *R. R.* for their debt and damages aforeſaid; and you the ſaid ſheriff of *Middleſex* at that day returned to us, that the ſaid *R.* had no goods or chattels in your bailiwick, which were of the ſaid *L. R.* at the time of his death, in her hands to be adminiſtered, whereof you could cauſe to be made the ſaid debt or damages, or any part thereof, nor had the ſaid *R.* any

Poſt ſci. fa.

of

of her own proper goods and chattels in your bailiwic, whereof you could cauſe to be made the ſaid damages, or any part thereof, according to the demand of that writ: And whereas thereupon in our ſaid court before us, there were afterwards ſuch proceedings, that by our ſaid court before us it was conſidered, that the ſaid *T. W. P. S. R. R.* the ſurviving executors of the ſaid *G. C.* ſhould have execution againſt the ſaid *R.* of the ſaid two hundred pounds of debt, and alſo of the ſaid ſixty-three ſhillings for the damages, coſts and charges aforeſaid, to be levied of the proper goods and chattels of the ſaid *R.* And it was further conſidered by our ſaid court before us, that the ſaid *T. W. P. S.* and *R. R.* ſhould recover againſt the ſaid *R.* twenty and eight pounds for their coſts and charges by them about their ſuit by occaſion of the proſecuting our writ of *ſcire facias* in that behalf expended, adjudged by our ſaid court before us, to the ſaid *T. W. P. S.* and *R. R.* at their requeſt, according to the form of the ſtatute in ſuch caſe lately made and provided: We therefore command you, that you take the ſaid *R.* if ſhe may be found in your bailiwic, and keep her ſafely, ſo that you may have her body before us at *Weſtminſter*, on next after to ſatisfy the ſaid *T. W. P. S.* and *R. R.* of the ſaid two hundred pounds of debt, and of the ſaid ſixty-three ſhillings of damages, and alſo of the ſaid twenty and eight pounds for the coſts and charges aforeſaid, adjudged to the ſaid *T. W. P. S.* and *R. R.* as aforeſaid, according

to

to the form of the ſaid ſtatute; and have there then this writ. Witneſs, &c.

Ca. ſa. *againſt an adminiſtratrix upon a* non proſs.

GEORGE the third, by the grace of God, of *Great Britain*, *France* and *Ireland* king, defender of the faith, &c. To the ſheriffs of *London* greeting: We command you, that you take *Jane Tudor*, adminiſtratrix of all and ſingular the goods and chattels which were of *Thomas Tudor* at the time of his death, who died inteſtate, as it is ſaid, if ſhe may be found in your bailiwic, and ſafely keep her, ſo that you may have her body before us at *Weſtminſter*, on next after to ſatisfy *James Comber* of which in our court before us, according to the form of the ſtatute in ſuch caſe lately made and provided, were adjudged to the ſaid *James* for his coſts and charges by him ſuſtained about his defence in a certain action of a plea of at the ſuit of the ſaid *Jane*, becauſe the ſaid *Jane* did not afterwards further proſecute that action, and whereof ſhe is convicted, as appears to us of record; and have there then this writ. Witneſs, &c.

Ca. ſa. *upon a* non proſs *for want of a declaration.*

GEORGE the third, by the grace of God, of *Great Britain*, *France* and *Ireland* king, defender of the faith, &c. To the ſheriffs of *London* greeting: We command you, that you take *Sarah Wheeler*, widow, if ſhe ſhall be found in your bailiwic, and ſafely keep her, ſo that you may have her body before us at *Weſtminſter*, on next after to ſatisfy *Robert Parry* of which in our ſaid court before us at

at *Weſtminſter* were adjudged to the ſaid *Robert*, according to the form of the ſtatute in that caſe lately made and provided, for his coſts and charges by him ſuſtained about his defence, in appearing to our certain writ of *latitat* proſecuted againſt the ſaid *Robert*, at the ſuit of the ſaid *Sarah*; and whereupon the ſaid *Sarah* did not afterwards further proſecute that writ, as appears to us of record; and have there then this writ. Witneſs, *&c.*

GEORGE the third, *&c.* To the ſheriff of *Suſſex* greeting: Whereas by our writ we lately commanded *N. P.* eſq; late ſheriff of your county, that of the goods and chattels of *John Jones*, otherwiſe called *John Jones* of, *&c.* in his bailiwic, he ſhould cauſe to be made one hundred pounds of debt, which *William Maddox* lately in our court before us at *Weſtminſter* recovered againſt him, and alſo ſixty-three ſhillings, which in our ſaid court before us were adjudged to the ſaid *William Maddox* for his damages which he had ſuſtained, as well by occaſion of the detaining that debt, as for his coſts and charges by him about his ſuit in that behalf expended, whereof the ſaid *John Jones* was convicted, as appeared to us of record; and that he ſhould have that money before us at *Weſtminſter*, on next after laſt paſt, to render to the ſaid *William Maddox* for the debt and damages aforeſaid; and our ſaid late ſheriff of your county at that day returned to us, that he by virtue of the ſaid writ to him directed had cauſed to be made of the goods and chattels of the ſaid *John Jones* thirty pounds parcel

Teſtatum ca. ſa. *after parcel levied by* fi. fa.

parcel of the debt and damages aforesaid; which said money he had caused to be paid to the said *William Maddox* in part of the said debt and damages: And the said sheriff further certified, that the said *John Jones* had no more or other goods in his bailiwic, whereof he could cause to be made the residue of the said debt and damages, or any part thereof; and whereas by our writ we lately commanded our sheriffs of *London*, that they should take the said *J. J.* if he should be found in their bailiwic, and safely keep him, so that they might have his body before us at *Westminster*, on next after to satisfy the said *W. M.* of seventy-three pounds and three shillings, the residue of the said debt and damages in form aforesaid recovered; and our said sheriffs of *London* at that day returned to us, that the said *J. J.* was not found in their bailiwic; upon which on the behalf of the said *W. M.* it is sufficiently certified in our court before us, that the said *J. J.* lurks and secretes himself in your county; we therefore command you, that you take the said *J. J.* if he may be found in your bailiwic, and safely keep him, so that you may have his body before us at *Westminster*, on next after to satisfy the said *W. M.* of the said seventy-three pounds and three-shillings, the residue of the debt and damages aforesaid; and have there then this writ. Witness, *&c.*

A

A fi. fa. *in caſe.*

GEORGE the third, by the grace of God, of *Great Britain*, *France* and *Ireland* king, defender of the faith, &c. To the ſheriff of *Lincoln* greeting: We command you, that of the goods and chattels of *C. D.* in your bailiwic, you cauſe to be made one hundred pounds, which *A. B.* lately in our court before us at *Weſtminſter* recovered againſt the ſaid *C. D.* for his damages which he ſuſtained, as well by means of the not performing certain promiſes and undertakings lately made by the ſaid *C. D.* to the ſaid *A. B.* as for his coſts and charges by him about his ſuit in that behalf expended; whereof the ſaid *C. D.* is convicted, as appears to us of record; and have that money before us at *Weſtminſter*, on next after to render to the ſaid *A. B.* for his damages aforeſaid; and have there then, &c. Fi. fa. *in caſe on promiſe.*

If in debt, ſay, You cauſe to be made one hundred pounds of debt, which *A. B.* lately in our court before us at *Weſtminſter* recovered againſt him, and alſo ſixty and three ſhillings which in our ſame court before us at *Weſtminſter* aforeſaid were adjudged to the ſaid *A. B.* for his damages which he ſuſtained, as well by occaſion of the detaining that debt, as for his coſts and charges by him about his ſuit in that behalf expended, whereof the ſaid *C. D.* is convicted, as appears to us of record, and have that money before us at *Weſtminſter*, on next after to render *In debt.*

render to the ſaid *A. B.* for his debt and damages aforeſaid, *&c.*

Covenant. If in covenant, ſay, Which he ſuſtained as well by means of the breaking a certain covenant lately made between the ſaid *C.* and the ſaid *A.* as for his coſts and charges, *&c.*

If after ſci. fa. If you make out a *ca. ſa.* or a *fi. fa.* after a *ſci. fa.* has iſſued, after the words "as it "appears to us of record" add, And whereupon in our ſaid court before us at *Weſtminſter*, it is conſidered, that the ſaid *A. B.* have his execution againſt the ſaid *C. D.* of the damages aforeſaid, [or debt and damages aforeſaid, as the action is] by the default of the ſaid *C.* and have that money, *&c.*

Fi. fa. *for an executor on a Judgment recovered by the teſtator.* *GEORGE* the third, *&c.* To the ſheriffs of *London* greeting: We command you, that of the goods and chattels of *Edward Walmeſley*, gent. in your bailiwic, you cauſe to be made two hundred pounds of debt, which *Thomas Haſſel*, eſq; now deceaſed, in his life-time, lately in our court before us at *Weſtminſter* recovered againſt him, and alſo ſixty-three ſhillings, which in our ſaid court before us were adjudged to the ſaid *Thomas* for his damages which he ſuſtained, as well by occaſion of the detaining that debt, as for his coſts and charges by him about his ſuit in that behalf expended, whereof the ſaid *Edward* is convicted, as appears

Sci. fa. to us of record; and whereupon in our ſaid court before us, it is conſidered, that *William Haſſel*, eſq; executor of the teſtament and laſt will

will of the ſaid *Thomas*, have his execution againſt the ſaid *Edward* of the debt and damages aforeſaid, according to the force, form and effect of the ſaid recovery; and have that money before us at *Weſtminſter*, on next after to render to the ſaid *William* for the debt and damages aforeſaid; and have there then this writ. Witneſs, *&c.*

Fi. fa. *for an executor againſt an adminiſtrator* de bonis non.

GEORGE the third, *&c.* To the ſheriff of *Kent* greeting: We command you, that of the goods and chattels in your bailiwic which were of *Francis Howe*, eſq; deceaſed, otherwiſe called *Francis Howe* of, *&c.* at the time of his death in the hands of *Thomas Howe*, eſq; adminiſtrator of all and ſingular the goods and chattels, rights and credits, which were of the ſaid *Francis Howe* at the time of his death to be adminiſtered, by *William Howe* and *John Howe*, deceaſed, late executors of the teſtament and laſt will of the ſaid *Francis Howe*, in the life-time of the ſaid *William Howe* and *John Howe* unadminiſtered, you cauſe to be made four hundred pounds of debt, which *James Comber*, eſq; and *Frances* his wife, lately in our court before us at *Weſtminſter*, recovered againſt the ſaid *William Howe*, after the death of the ſaid *John Howe*; and alſo five pounds, which in our ſaid court before us were adjudged to the ſaid *James* and *Frances* for their damages which they had ſuſtained, as well by occaſion of the detaining that debt, as for their coſts and charges by them about their ſuit in that behalf expended, to be levied of the goods and chattels which were of the ſaid *Francis*

Francis Howe at the time of his death in the hands of the ſaid *William Howe* to be adminiſtered, if he has ſo much in his hands; and if he has not ſo much in his hands, then the ſaid damages to be levied of the proper goods and chattels of the ſaid *William Howe*, whereof he was convicted, as appears to us of record; and whereupon, in our ſaid court before us, it is conſidered, that the ſaid *James Comber* and *Frances* have there execution againſt the ſaid *Thomas Howe* of the debt and damages to be levied of the goods and chattels of the ſaid *Francis Howe* at the time of his death in the hands of the ſaid *William Howe* to be adminiſtered, according to the force, form and effect of the ſaid recovery; and have that money before us at *Weſtminſter*, on next after to render to the ſaid *James Comber* and *Frances* for the debt and damages aforeſaid; and have there then this writ. Witneſs, *&c.*

Sci. fa.

An elegit.

Elegit.

GEORGE the third, by the grace of God, of *Great Britain*, *France* and *Ireland* king, defender of the faith, *&c.* To the ſheriffs of, *&c.* greeting: Whereas *A. B.* lately in our court before us at *Weſtminſter*, by bill without our writ, and by the judgment of the ſame court, recovered againſt *C. D.* 100 *l.* of debt, and alſo 40 *s.* for his damages which he ſuſtained as well by means of the detaining the ſaid debt, as for his coſts and charges by him about his ſuit in that behalf expended, whereof the ſaid *C. D.* was convicted,

victed, as appears to us of record; and afterwards the said *A. B.* came in our court before us, and chose to be delivered to him all the goods and chattels of the said *C. D.* (except the oxen and beasts of his plough), and also a moiety of all and singular the lands and tenements of the said *C. D.* in your bailiwic, to hold to him the said goods and chattels as his own proper goods and chattels, and also to hold the said moiety to him and his assigns as his free tenement, according to the form of the statute in that case made and provided, until the said debt and damages should be thereof fully levied: We therefore command you, that without delay you cause all the goods and chattels of the said *C. D.* in your bailiwic, (except the oxen and beasts of his plough), and also a moiety of all the lands and tenements of the said *C. D.* in your bailiwic, whereof the said *C. D.* on the day of on which day the said judgment was given, or at any time afterwards was seized, to be delivered to the said *A. B.* by a reasonable price and extent; to hold to him the said goods and chattels as his own proper goods and chattels, and also to hold the moiety of the said lands and tenements as his free tenement, to him and his assigns, according to the form of the said statute, until the said debt and damages shall be thereof fully levied; and that you make appear to us at *Westminster*, on next after under your seal and the seals of them by whose oath you shall make the said extent and appraisement, in what manner you shall

have executed this our writ; and have there then this writ. Witneſs, &c.

A writ teſted out of term is void, and the court will take notice that it is teſted out of term. 1 *R. Raym.* 4.

Elegit *againſt tertenants.*

GEORGE the third, by the grace of God, of *Great Britain*, *France* and *Ireland* king, defender of the faith, &c. To the ſheriff of *Eſſex* greeting: Whereas *R. R.* eſq; lately in our court before us at *Weſtminſter*, by bill without our writ, and by the judgment of the ſame court, recovered againſt *W. S.* gent. otherwiſe called, &c. one thouſand pounds of debt, and alſo fifteen pounds for his damages which he has ſuſtained, as well by occaſion of the detaining that debt, as for his coſts and charges by him about his ſuit in that behalf expended, whereof the ſaid *W. S.* is convicted, as appears to us of record; and whereupon in our ſame court before us, it is conſidered, that the ſaid *R. R.* have his execution againſt *J. W. C. B.* and *E. G.* tenants of one meſſuage, five barns, and two ſtables, one garden, one orchard, twenty acres of land, and twenty acres of meadow, fifty acres of paſture, and ten acres of wood, with the appurtenances, ſituate, lying and being in the pariſh of *Weſtham* in your county, which were the lands and tenements of the ſaid *W. S.* deceaſed, (of which the ſaid *W. S.* on the day of giving the ſaid judgment, and afterwards was ſeiſed in his demeſne as of fee) of the debt and damages aforeſaid to be levied of thoſe lands and tenements; and

Sci. fa.

afterwards the ſaid *R. R.* came in our ſaid court before us, and, according to the form of the ſtatute in ſuch caſe made and provided, choſe a moiety of the ſaid lands and tenements to be delivered to him by a reaſonable price and extent, to hold to him and his aſſigns as his free tenement, according to the form of the ſaid ſtatute, until the ſaid debt and damages ſhall be thereof fully levied: We therefore command you, that without delay you cauſe a moiety of all the ſaid lands and tenements to be delivered to the ſaid *R. R.* by a reaſonable price and extent, to hold to him and his aſſigns as a free tenement, according to the form of the ſaid ſtatute, until the ſaid debt and damages ſhall be thereof fully levied; and in what manner you ſhall execute this our precept, make appear to us at *Weſtminſter*, on next after remitting to us this our writ. Witneſs, *&c.*

A return to an elegit.

Dorſet, to wit. AN inquiſition indented taken at *B.* in the county aforeſaid, on the day, *&c.* before me *C. D.* eſq; ſheriff of the county aforeſaid, by virtue of a writ of our lord the king to me directed, and to this inquiſition annexed by the oaths of [naming the 12 jurors] good and lawful men of my bailiwic, who upon their oath ſay, that *E. F.* named in the ſaid writ on the day of giving the judgment mentioned in the ſaid writ, to wit, on the day, *&c.* and on the day of taking this inquiſition was ſeiſed in his demeſne as of fee of and in one meſuage acres of land, acres of

meadow, acres of paſture, acres of wood, and acres of furze and heath, with the appurtenances called *G.* within the pariſh of *H.* in the county aforeſaid, now or late in the poſſeſſion of the ſaid *E. F.* or of his aſſigns, of the clear yearly value in all iſſues above repriſes of forty pounds, and of and in one other meſuage, acres of land, acres of meadow, acres of paſture acres of wood, and acres of furze and heath, with the appurtenances called *K.* within the ſaid pariſh of *H.* in the county aforeſaid, now or late in the tenure of *L. M.* or of his aſſigns, of the clear yearly value in all iſſues above repriſes of ten pounds, and that one of the ſaid two meſuages firſt abovementioned, and acres of land, acres of meadow, acres of paſture, acres of wood, and acres of furze and heath, called *G.* being of the yearly value of are one moiety of the ſaid tenements; which moiety of the ſaid tenements I the ſaid ſheriff on the day of taking this inquiſition, have cauſed to be delivered to *N. O.* in the ſaid writ named, by the price and extent aforeſaid, to hold as his free tenement to him and his aſſigns, according to the form of the ſtatute in that caſe made and provided, until the debt and damages in the ſaid writ mentioned ſhall be thereof fully levied; and the ſaid jurors upon their oath further ſay, that the ſaid *E. F.* has no goods or chattels, nor has nor had at the time of giving the ſaid judgment, nor at any time afterwards ever had any other lands or tenements in the ſaid county,

ty, to the knowledge of the ſaid jurors. In teſtimony whereof, as well I the ſaid ſheriff as the ſaid jurors, have to this inquiſition alternately put our ſeals, on the day and year, and at the place aforeſaid.

C. D. eſq; ſheriff.

The *ca. ſa.* and *fi. fa.* are only ſealed, for which you pay 7 *d.* but the *elegit* is both ſigned and ſealed; you pay 1 *s.* 8 *d.* to the chief clerk for ſigning it, and 7 *d.* to the ſealer for ſealing it.

Proceedings by original.

THIS antient method of proceeding, though now much out of uſe, is ſtill very neceſſary in many caſes. *Uſe of proceeding by original.*

As, for example in proceeding in this court againſt peers, who by the law of the land are not to be arreſted in any civil cauſe whatſoever; and therefore not to be proceeded againſt by bill, becauſe therein ſuppoſed to be *in cuſtodia mareſcalli. Sed quære.* *Againſt peers, who cannot be ſued by bill, becauſe thereby ſuppoſed to be* in cuſtodia mareſcalli.

And againſt corporate bodies, as mayor and aldermen, dean and chapter, maſter and fellows, *&c.* and hundredors on the ſtatute of hue and cry. *And bodies corporate.*

No *quare impedit*, writ of right, *replevin* and ſuch like, come into this court, but either by original writ, or elſe by being removed from inferior courts by writs which are in their nature original writs, and returnable *coram nobis ubicunque, &c.* as writs of *recordari facias loquelam, accedas ad curiam, certiorari*, writs of error, *&c.* *Several actions in this court, only by original writ.*

No writ of error on judgment by original but in parliament.

It is a much more expeditious way of procuring the ſuitor his right than by bill, for no writ of error lieth on a judgment obtained by original writ, but what muſt be made returnable in the high court of parliament, and that purchaſed and carried on at a very dear rate, and commonly attended with exemplary coſts in favour of the defendant in error, if the judgment be affirmed; whereas, if the judgment be on an action brought by bill, a writ of error may be brought returnable in the *Exchequer* chamber, and from thence, after four terms attendance, a writ of error may be brought returnable in the houſe of lords.

Its uſe in outlawing defendants that conceal themſelves.

It is alſo of excellent uſe in outlawing debtors who are difficult to be arreſted, and lie concealed in holes and corners ſpending their creditors ſubſtance.

No ſurrender in diſcharge of bail on outlawry.

And *note*, that if the defendant be arreſted on the *capias utlagatum*, and bail is put in, the defendant cannot diſcharge his bail by ſurrendering himſelf to priſon, but he muſt pay the condemnation-money, or they for him.

Cannot proceed by original in debt, detinue, covenant or account.

It is ſaid, that no original writ may be made returnable in this court in any action of debt, detinue, covenant or account. *Vide Carth.* 234.

Original writ a warrant for the capias.

The original writ which is iſſued out of the high court of *Chancery*, and made out by the curſitor of the proper county, is not at this day in general caſes ſerved on the defendant, except it be againſt a peer or a body corporate, it being only a foundation or warrant for the *capias*, on which the defendant may be arreſted, and the plaintiff have bail for his debt.

In

In order thereto, the plaintiff's attorney draws up a *præcipe*, which is to contain the whole count or declaration, in which you, by the ſtatute of Additions, muſt ſet forth the defendant's eſtate or degree, or miſtery, and the town or hamlet, or place and county, where he is or was converſant. *Method of proceeding.* Stat. 1 H. 5. c. 5.

Præcipe.

Middleſex. If *A. B.* ſhall give you ſecurity to proſecute his ſuit, then put by * ſureties and ſafe pledges *C. D.* late of *Weſtminſter* in the county of *Middleſex*, joiner, That, *&c.* To ſhew, that whereas [here ſet forth the whole declaration *verbatim*, 'till you come to] to the damage of the ſaid *A. B.* of 36*l.* as he ſays. * 1 Lev. 2.

Robert Richardſon, attorney, 8 *May* 1768.

Returnable before our lord the king, on the morrow of the Holy *Trinity*, whereſoever, *&c.*

Affidavit for 20*l.*

You carry the *præcipe* to the filacer, who will make out the *capias* and procure the original and return, and file it for you; you pay the filacer 2*s.* 6*d.* for the firſt count of the *capias*, and 6*d.* for every other count, and the like for the original, which he pays over to the curſitor, beſides 4*d.* for filing the original, making together 5*s.* 4*d.* for the firſt count, and 1*s.* for every ſubſequent count. You carry the *capias* to be ſealed, for which you pay 7*d.* and then to the ſheriff for a warrant, for which you pay 2*s.* 4*d.* *Fees on original and capias.*

You muſt be cautious that the teſte of the original (which muſt be at leaſt fifteen days before the teſte of the *capias*) be ſubſequent to your cauſe of action.

Fines on originals.

You pay on original writs, where the damages laid exceed 40 *l.* fines to the king in the following proportions.

	l.	*s.*	*d.*
From 40 *l.* to 100 marks,	0	6	8
From 100 marks to 100 *l.*	0	10	0
From 100 *l.* to 200 marks,	0	13	4
From 133 *l.* 6 *s.* 8 *d.* to 166 *l.* 13 *s.* 4 *d.*	0	16	8
From 166 *l.* 13 *s.* 4 *d.* to 200 *l.*	1	0	0
And for every 100 marks more,	0	6	8
And for every 100 *l.* more,	0	10	0

The return of the original, the teſte of the capias, &c.

If the defendant cannot be arreſted on the *capias*, you may have an *alias*, and after that a *pluries*. And *note*, that the return of the original is the teſte of the *capias*, the return of the *capias* the teſte of the *alias*, and the return of the *alias* the teſte of the *pluries*; and ſo on, unleſs the return of any of them happen on the eſſoin-day before any term, and then the next writ muſt bear teſte the firſt day of that term, for it cannot bear teſte out of term: But I think that regularly the *capias*, *alias*, *pluries* and exigent, ought reſpectively to bear teſte on the *quarto die poſt* of the return of the precedent writ; the contrary is practiſed merely for the ſake of expedition in the outlawry, as appears in *Try's Jus Filizarii*, *fol.* 184 to *fol.* 191. where the practice is both ways: The original, and all ſubſequent writs grounded thereupon, muſt have 15 days between the teſte and return of each,

Fifteen days between teſte and return on originals.

each, except in the caſes provided for by ſtatutes of the 16 *Car.* 1. *c.* 6. add 13 *Car.* 2. *ſtat.* 2. *c.* 2. before taken notice of. *Vide antea, fol.* 89, 90.

As you may have occaſion for the ſake of expedition to make out theſe writs yourſelf, though it is the filacer's duty to make them out, I ſhall give the following precedents.

Capias. *GEORGE* the third, by the grace of God, of *Great Britain*, *France* and *Ireland* king, defender of the faith, *&c.* To the ſheriff of *Middleſex* greeting: We command you that you take *Archibald Scot*, late of the pariſh of St. *Martin in the Fields* in your county, ſurgeon, if he be found in your bailiwic, and ſafely keep him, ſo that you may have him before us from the day of St. *Michael* in there weeks, whereſoever we ſhall be then in *England*, to anſwer to *Thomas Deveniſh* of a plea, that whereas the ſaid *Archibald*, on the day, *&c.* [as in the declaration to] to the damage of the ſaid *Thomas* of 30 *l.* as is ſaid; and have there then this writ. Witneſs, *&c.*

Adams.

Alias Capias. In the *alias capias*, after the words *We command you*, ſay, *As we have heretofore commanded you.*

Pluries. In the *pluries capias*, after the words *We command you*, ſay, *As we have oftentimes commanded you.*

Common appearance. If the action requires only a common appearance, you enter it with the filacer, and pay him 2 *s.* for it, out of which 1 *s.* is for the

Special bail. the duty. If it requires ſpecial bail, you carry the filacer a note of the names of the bail, with their places of abode and additions, and he will attend with you before a judge to put in bail, of which notice is to be given to the plaintiff's attorney in writing, and you muſt obſerve the directions before given as to excepting againſt and adding and juſtifying the bail, on which occaſion the filacer muſt attend with his book in court. You pay on putting in bail 16*s.* 6*d. viz.* Filacer 12*s.* 6*d.* Duty 2*s.* Judge's clerk 2*s.*

Method of declaring. The method of declaring by bill is different from that by original, which begins thus; *vide Carth.* 108.

Michaelmas *term in the eighth year of king* George *the third.*

Declaration by original. *Middleſex. C. D.* late of *Weſtminſter* in the county of *Middleſex*, joyner, was attached to anſwer *A. B.* in a plea of treſpaſs on the caſe, [as the action is] and whereupon the ſaid *A. B.* by *R. R.* his attorney complains, that whereas [then go on with your declaration as by bill] to the damages of the ſaid *A. B.* of 20 *l.* and thereupon he brings ſuit, *&c.*

No pleg. de proſ. And omit the *pleg. de proſequend'* uſed at the end of the declaration on proceedings by bill, pledges being returned on the original.

You give a rule with the clerk of the rules for the defendant to plead, as to which the directions before given will ſerve.

Of making up the iſſue. In making up the iſſue you begin with the declaration, and not with a memorandum, as you do when the proceedings are by bill; and

and at the end of the iſſue award the *venire* thus: And the ſaid ſaid *A. B.* doth the like, Therefore it is commanded to the ſheriff, that he cauſe to come before our lord the king, from the day of the Holy *Trinity* in three weeks [the return of the *venire*] whereſoever he ſhall then be in *England*, twelve, *&c.* by whom, *&c.* and who neither, *&c.* to take cognizance, *&c.* becauſe as well, *&c.* The ſame day is given to the parties aforeſaid, *&c.*

Award of the venire.

In making up the *niſi prius* record, the *jurata* is thus:

Middleſex. The jury between *A. B.* by his attorney, plaintiff, and *C. D.* late of, *&c.* of a plea of treſpaſs on the caſe, is reſpited before our lord the king, until from the day of St. *Michael* in three weeks, whereſoever, *&c.* unleſs [as before by bill to] The ſame day is given to the parties aforeſaid, *&c.*

The jurata by original.

GEORGE the third, by the grace of God, of *Great Britain*, *France* and *Ireland* king, defender of the faith, *&c.* To the ſheriff of greeting: We command you, that you cauſe to come before us from the day of whereſoever we ſhall then be in *England*, twelve free and lawful men of the body of your county, each of whom has at the leaſt ten pounds by the year of lands, tenements or rents, by whom the truth of the matter may be the better known, and who are in no wiſe of kin either to *A. B.* gentleman, the plaintiff, or to *C. D.* late of, *&c.* to make a certain jury between the parties aforeſaid, in a plea of treſpaſs on the caſe, becauſe as well the ſaid *C. D.* as the ſaid *A. B.* between whom the contention

Venire facias *on original.*

tion thereon is, have put themſelves upon that jury; and have there the names of the jurors, and this writ. Witneſs, *&c.*

Diſtringas jur.

GEORGE the third, by the grace of God, of *Great Britain*, *France* and *Ireland* king, defender of the faith, *&c.* To the ſheriff of greeting: We command you, that you diſtrain the ſeveral perſons named in the panel annexed to this writ, being the jurors ſummoned in our court before us, between *A. B.* gentleman, plaintiff, and *C. D.* late of, *&c.* by all their lands and chattels in your bailiwic, ſo that neither they, nor any one of them, lay their hands upon them, until you ſhall have another precept thereupon from us, and that you anſwer to us of the iſſues thereof, ſo that you may have their bodies before us on the whereſoever we ſhall then be in *England*, or before, [as in a *diſtringas* by bill] to make a certain jury between the parties aforeſaid, in a plea of treſpaſs on the caſe, and to hear their judgments thereupon of many defaults; and have there the names of the jurors and this writ. Witneſs, *&c.*

Subpœna.

GEORGE the third, by the grace of God, of *Great Britain*, *France* and *Ireland* king, defender of the faith, *&c.* To *E. F. G. H. J. K.* and *L. M.* greeting: We command you, that notwithſtanding all and ſingular your buſineſſes and excuſes whatſoever, you be in your proper perſons before us, [as in proceedings by bill] to teſtify all and ſingular thoſe things which you know in a certain action

action now pending undetermined in our court before us, between *A. B.* plaintiff, and *C. D.* late of, *&c.* in a plea of treſpaſs on the caſe. And this you are in no wiſe to omit, under the penalty of one hundred pounds. Witneſs, *&c.*

Note; In theſe and all other writs by original, in the concluſion before the teſte, you leave out the word *then*, ſaying, "And "have there this writ. Witneſs, *&c.*" and not "there then", *&c.* the place of the record being *ubicunque*, *&c.* and therefore uncertain.

Want of original helped after verdict.

Treſpaſs and ejectment by original, motion in arreſt of judgment, upon a fault in the original, for a bad original is not helped by verdict: But the maſter certifying there was no original at all, the plaintiff had judgment, though in his declaration he recited the original. 1 *Mod.* 3.

As to the reſt you proceed to trial as by bill.

If you have a judgment by default, and occaſion to make out a writ of inquiry, you begin thus.

Writ of inquiry.

GEORGE the third, by the grace of God, of *Great Britain*, *France* and *Ireland* king, defender of the faith, *&c.* To the ſheriff of *Middleſex* greeting: Whereas *C. D.* late of *Weſtminſter* in your county, joyner, was attached to be in our court before us, to anſwer *A. B.* of a plea, wherefore whereas [the declaration, *&c.* as in other writs of inquiry, to] to the damage of the ſaid *A. B.* of twenty

twenty pounds, as it is ſaid, &c. And it was in ſuch manner proceeded in our ſaid court, that the ſaid *A. B.* ought to recover againſt the ſaid *C. D.* his damages by occaſion of the ſaid treſpaſs on the caſe: But becauſe it is unknown to our court before us what damages the ſaid *A. B.* has ſuſtained by occaſion of the premiſſes: We therefore command you, that by the oath of twelve good and lawful men of your bailiwic, you diligently inquire what damages the ſaid *A. B.* has ſuſtained, as well by occaſion of the premiſſes, as for his coſts and charges by him about his ſuit in that behalf expended, and that the inquiſition which you ſhall thereupon take, you ſend to us from the day, &c. [the return] whereſoever we ſhall then be in *England*, under your ſeal and the ſeals of them by whoſe oath you ſhall take that inquiſition, together with this writ. Witneſs, &c.

Teſtatum capias.

In caſe the defendant does not live in the county you intend to try your action, you muſt have a *teſtatum capias* to arreſt the defendant in the county wherein he lives, grounded upon a *capias* iſſued in the county wherein you intended to try your action.

Outlawry.
Vide Goulſ. 179.
4 Leon. 41.
Yel. 28.
March 4.
Cro. Car. 537, 538.
1 Jones 430.
Cro. El. 908.
Moor 668. pl. 917.

If the defendant is not to be arreſted on the *capias*, *alias*, or *pluries*, the filacer will make you out an exigent and proclamation; and if the defendant does not appear on the return of the exigent, and which he may by a common appearance only, though your action be for 10,000 *l.* the filacer will make out a *capias utlagatum* either general or ſpecial; the general *capias utlagatum* is to take the body only,

only, the ſpecial *capias utlagatum* is to extend the defendant's goods and chattels, lands and tenements, and to take the body alſo; and if the defendant be arreſted on the *capias utlagatum*, he muſt give bail as before to anſwer the condemnation. *Vide Infra* 305. 3 Danv. 302. Stat. 31 Eliz. c. 3. §. 3.

Erbo, a foreign merchant, who had never been in *England*, was outlawed in an action *ſur aſſumpſit* for goods ſold and delivered, and a ſhip and other effects were ſeized on a ſpecial *capias utlagatum*: The court refuſed to vacate the outlawry on motion, and affidavit that the defendant had never been *infra legem*, and therefore could not be outlawed, *i. e.* put *extra legem*; but ſaid the defendant muſt bring a writ of error, which he accordingly did, and put in bail according to the ſtatute; whereupon the plaintiff conſented, that the outlawry ſhould be reverſed. A good way to get bail from a foreigner. *Mich.* 10 *W.* 3. *B. R. Mathews* v. *Erbo*, *Carth.* 459. *Bail got of a foreigner who had never been in* England, *by outlawing him.*

By the *ſtat. Weſtm.* 2. (13 *Ed.* 1. *c.* 45.) proclamation of outlawry is to be made in the county court, every freeholder being ſuppoſed to be there, becauſe there he ought to be, and therefore bound to take notice of it. *Carth.* 484. *Proclamation in the county court*, &c.

For avoiding ſecret outlawries in perſonal actions againſt perſons having *known* places of their dwelling, a writ of proclamation ſhall be awarded, having day of teſte and return, as the exigent ſhall have, directed to the ſheriff of the county where the defendant at the time of the exigent awarded ſhall be dwelling; and the ſheriff is to make one proclamation in the county court, a ſecond at the general *Writ of proclamation to be awarded.*

general quarter-ſeſſions, and a third one month at leaſt before the *quinto exact*, at the moſt uſual door of the church, *&c.* where the defendant ſhall be dwelling. Outlawry, if no proclamation be awarded and returned, ſhall be void. *Stat.* 31 *Eliz. c.* 3. §. 1. *Stamf.* 67. *Hetley* 95. *Goulſb.* 128. *Cro. Eliz.* 371. *Stat.* 31 *Eliz. c.* 9. 1 *H.* 5. 5. *Stat.* 6 *H.* 4. 39 *H.* 6. 1. *b. Utlary, Br.* 34. *Co.* 4 *Inſt.* 73. *Dyer* 20, 41, 213. *Bro. Error* 106. *Dyer* 214. 1 *Rol.* 159.

The officer to take but 6 *d.* for making the writ of proclamation. *Stat.* 6 *H.* 8. *c.* 4. §. 4. And the ſheriff to take but 1 *s.* for making the proclamation at or near to the church-door. *Stat.* 31 *Eliz. c.* 3.

Bail not only to appear to a new action, but alſo to anſwer the condemnation.

Before any allowance of any writ of error, or reverſing of any outlawry be had by plea or otherwiſe, through or by want of any proclamation to be had or made according to the form of this ſtatute, the defendant ſhall put in bail, not only to appear and anſwer to the plaintiff, in a new action to be commenced for the cauſe mentioned in the firſt action, but alſo to ſatisfy the condemnation, if the plaintiff ſhall begin his ſuit before the end of two terms next after the allowing the writ of error, or otherwiſe avoiding of the ſaid outlawry. *Stat.* 31 *Eliz. c.* 3. §. 3. *Vide ſupra.*

Of proceeding againſt the goods.

If upon the ſpecial *capias utlagatum* any goods are taken, and the defendant is not like to put in bail, you may proceed to get a ſatisfaction out of the goods in the following manner; but if the goods taken are not of the

the value of 50 or 60 *l.* they will not anſwer the expence of proceeding againſt them.

Get the ſheriff to take an inquiſition purſuant to the writ of ſpecial *capias utlagatum*, of which it may not be improper to give notice, as on a writ of inquiry.

Then get the writ returned by the ſheriff, and the inquiſition tranſcribed by the filacer into the court of *Exchequer*.

Employ a clerk in the king's remembrancer's office, who will procure a *venditioni exponas*, whereupon the ſheriff will ſell the goods.

Then petition the lords of the treaſury, that the money levied may be paid to the plaintiff towards ſatisfaction of his debt and charges; the lords of the treaſury will refer the petition to their ſolicitor; you muſt attend him with the *venditioni exponas*, and return and lay before him an affidavit of the debt and charges, and the bill of charges. Upon his report, if in your favour, as it generally is, if debt and charges exceed the money levied, one of the clerks of the treaſury will procure you a warrant to the attorney general to conſent, on your moving the court of *Exchequer*, that the money levied be paid to the plaintiff; and on ſuch motion and conſent the court will order the money to be paid accordingly.

If the ſum levied exceeds not 20 *l.* you need not apply to the treaſury; the court of *Exchequer* will order it to be paid to the plaintiff. For your better inſight into this proceeding, I have here ſet forth the ſeveral proceedings at large.

Exigent.

As to warrant of attorney on the exigent, ſee Gilbert's Hiſtory of the Practice of the *C. P.* fo. 15.

Stat. Ed. 1.

GEORGE the third, *&c.* To the ſheriff of *Middleſex* greeting: We command you, that you cauſe *Archibald Scot*, late of the pariſh of St. *Martin in the Fields* in your county, ſurgeon, to be demanded from county court to county court, until, according to the law and cuſtom of * *our kingdom of England*, he be outlawed if he does not appear, and if he does appear, then take him and keep him ſafely, ſo that you may have his body before us on the octave of the purification of the bleſſed *Mary*, whereſoever we ſhall be then in *England*, to anſwer to *Thomas Deveniſh* of a plea, wherefore whereas the ſaid *Archibald*, on, *&c.* [the whole declaration] to the damage of the ſaid *Thomas* of thirty pounds, as it is ſaid; and whereupon you did in three weeks from the day of the Holy *Trinity* laſt paſt make a return to us, that the ſaid *Archibald Scot* was not found in your bailiwic; and have you there this writ. Witneſs *William* Lord *Manſfield* at *Weſtminſter*, the 23d day of *January* in the eighth year of our reign.

Richardſon. *Adams.*

Proclamation.

GEORGE the third, *&c.* To the ſheriff of *Middleſex* greeting: Whereas by our writ we have lately commanded you, that you cauſe *Archibald Scot*, late of the pariſh of St. *Martin in the Fields* in your county, ſurgeon,

* I think it ſhould be, *according to the law and cuſtom of* England, there being ſince the Union no ſuch kingdom as *England*.

ſurgeon, to be demanded from county court to county court, until, according to the law and cuſtom of *our kingdom* of *England*, he be outlawed if he ſhall not appear; and if he ſhould appear, then that you ſhould take him and keep him ſafe, ſo that you might have him before us on the octave of the purification of the bleſſed *Mary*, whereſoever we ſhould then be *England*, to anſwer to *Thomas Deveniſh* of a certain plea of treſpaſs on the caſe, to the damage of the ſaid *Thomas* of thirty pounds as is ſaid: We therefore command you, that purſuant to the ſtatute made for ſuch purpoſe in the thirty-firſt year of the reign of *Elizabeth*, late queen of *England*, you cauſe the ſaid *Archibald Scot* to be proclaimed three ſeveral days according to the form of the ſaid ſtatute; one of which proclamations to be made at or near the moſt uſual church-door of the pariſh where the ſaid *Archibald Scot* is an inhabitant, that he render himſelf to you, ſo that you may have his body before us at the aforeſaid time, to anſwer the ſaid *Thomas Deveniſh* of the plea aforeſaid; and have there this writ. Witneſs *William* Lord *Mansfield* at *Weſtminſter*, the twenty-third day of *January* in the eighth year of our reign.

Stat. 31 Eliz. c. 3.

Richardſon. *Adams.*

At my county court held for the county of *Middleſex*, at the ſign of the *Elephant and Caſtle* in the pariſh of St. *Andrew Holbourn* in the county aforeſaid, on the day of in the year within written, the within named *Archibald* was a firſt time demanded, and did not appear; and at my county court held

Return of the exigent aforeſaid.

held for the ſaid county of *Middleſex* at the ſign of the *Elephant and Caſtle* aforeſaid, the ninth day of *Auguſt* in the year aforeſaid, the ſaid *Archibald* was a ſecond time demanded, and did not appear; and at my county court held for the ſaid county of *Middleſex* at the ſign of the *Elephant and Caſtle* aforeſaid, the ſixth day of *September* in the year aforeſaid, the ſaid *Archibald* was a third time demanded, and did not appear.

The anſwer of
Richard Peers, eſquire,
and
William Naſh, eſquire,
} ſheriff.

This writ, as above indorſed, was delivered to me the under-named preſent ſheriff by the abovernamed late ſheriff at his going out of his office.

At my county court held for the ſaid county of *Middleſex*, at the ſign of the *Elephant and Caſtle* aforeſaid, the fourth day of *October* in the year aforeſaid, the ſaid *Archibald* was a fourth time demanded, and did not appear; and at my county court held for the ſaid county of *Middleſex*, and at the ſign of the *Elephant and Caſtle* aforeſaid, the firſt day of *November* in the year aforeſaid, the ſaid *Archibald* was a fifth time demanded, and did not appear:

Therefore, by the judgment of eſq; and eſq; coroners of our ſovereign lord the king for the county aforeſaid, the ſaid *Archibald* is outlawed.

The

The anſwer of
Richard Peers, eſquire,
and
William Naſh, eſquire, } ſheriff.

By virtue of the within writ to me directed, I cauſed the within-named *Archibald* to be proclaimed three ſeveral days according to the effect of the within-mentioned ſtatute, as it is within commanded me. *Return of the proclamation.*

The anſwer of
Richard Peers, eſquire,
and
William Naſh, eſquire, } ſheriff.

GEORGE the third, *&c.* To the ſheriff of *Middleſex* greeting: We command you, that you fail not, on account of any liberty within your county, but that by the oath of good and lawful men of your county, you diligently inquire what goods and chattels, lands and tenements, *Archibald Scot*, late of the pariſh of St. *Martin in the Fields* in your connty, ſurgeon, hath, or had in your bailiwic the firſt day of *November* laſt paſt, or at any time afterwards, on which day he was outlawed in your county, at the ſuit of *Thomas Deveniſh* in a certain plea of treſpaſs on the caſe, to the damage of the ſaid *Thomas* of thirty pounds, as you have returned to us ſome time ſince, and by their oath cauſe the ſame to be extended and appraiſed according to the true value thereof: And whatever you find by that inquiry take *Special* cap. utlagatum.

into our hands and keep ſafe, ſo that you anſwer to us the value and iſſue thereof: And having ſo extended and appraiſed the ſame, what you ſhall have done therein make known unto us on the octave of St. *Hilary* whereſoever we ſhall then be in *England*, diſtinctly and plainly under your ſeal, and the ſeals of thoſe by whoſe oath you ſhall have made the extent and appraiſement: And for that the ſaid *Archibald Scot* conceals himſelf, and runs up and down from place to place in your county, in contempt of us and in prejudice to our crown, as we are informed: We command you alſo, that you take the ſaid *Archibald Scot* whereſoever he ſhall be found in your bailiwic, as well within a liberty as without, and keep him ſafe, ſo that you may have him before us at the aforeſaid time, to do and to receive what our court before us ſhall in this caſe determine; and have there this writ. Witneſs *William* Lord *Mansfield*, at *Weſtminſter*, the 28th day of *November* in the eighth year of our reign.

26th *Dec.* 1768.

Adams.

Return of ſpecial cap. utlagatum.

By virtue of this writ to me directed, I have taken the body of the within-named *Archibald Scot*, whoſe body I kept in my ſafe cuſtody until afterwards, to wit, on the 19th day of *January* in the eighth year of his now majeſty's reign, on which day I received his majeſty's writ of *habeas corpus cum cauſa* to me directed; by virtue of which writ immediately after the receipt thereof, to wit, on

on the ſaid 19th day of *January*, I did conduct the body of the ſaid *A. S.* before Sir *Edward Clive*, knt. one of the juſtices of the king's court of the bench, according to the command of the ſaid writ, which ſaid juſtice did then receive from me the body of the ſaid *A. S.* and did commit him to the cuſtody of the warden of his majeſty's priſon of the *Fleet*, and did then diſcharge me from the further keeping of the ſaid *A. S.* and therefore I cannot have the body of the ſaid *A. S.* before our lord the king on the day within mentioned, whereſoever our ſaid lord the king ſhall then be in *England*, as by the ſaid writ I am commanded. The further execution of this writ appears in the inquiſition and inventory hereunto annexed.

The anſwer of
Richard Peers, eſquire,
and
William Naſh, eſquire,
} ſheriff.

Middleſex. An inquiſition indented, taken at the *Three Tuns* in *Brook-ſtreet*, near *Holbourn* in the county aforeſaid, the day of in the eighth year of the reign of our ſovereign lord *George* the third, by the grace of God, of *Great Britain*, *France* and *Ireland* king, defender of the faith, before me *Richard Peers*, eſq; and *William Naſh*, eſq; ſheriff of the county aforeſaid, by virtue of the king's writ to me directed, and to the inquiſition annexed, on the oath of *Stephen World*, *William Pope*, *Thomas Grace*, *The inquiſition.*

Thomas Barlow, *Simon Watſon*, *John Davies*, *Chriſtopher Cotterel*, *Peter Brown*, *Samuel Holloway*, *Thomas Harris*, *Richard Good*, and *John Bland*, good and lawful men of my bailiwic, who being ſworn and charged to inquire of all ſuch matters and things as in the ſaid writ are mentioned and contained, on their oaths do ſay, that *Archibald Scot* in the ſaid writ named, on the firſt day of *November* laſt, on which day he became outlawed, was, and on the day of taking this inquiſition is, poſſeſſed as of his own proper goods and chattels, of and in the ſeveral goods and chattels particularly mentioned and expreſſed in the ſchedule or inventory thereof hereunto annexed, which ſaid goods and chattels are worth, to be ſold, the ſum of 39 *l.* 3 *s.* All which ſaid goods and chattels, I the ſaid ſheriff, by virtue of the ſaid writ, on the day of taking this inquiſition, have ſeized and taken into his majeſty's hands according to the command of the ſaid writ: And the jurors aforeſaid on their ſaid oath further ſay, that the ſaid *Archibald Scot* on the ſaid firſt day of *November*, or at any time ſince, had not any lands or tenements, or on the day of taking this inquiſition hath any other more goods or chattels in my bailiwic which can be ſeized or taken into his majeſty's hand, according to the command of the ſaid writ. In witneſs whereof, as well I the ſaid ſheriff as the ſaid jurors have to this inquiſition ſet our ſeals the day, year and place firſt above-mentioned.

GEORGE

GEORGE the third, by the grace of God, of *Great Britain*, *France* and *Ireland* king, defender of the faith, *&c.* To the ſheriffs of *Middleſex* greeting: Whereas by a certain inquiſition indented, taken at the *Three Tuns* in *Brook-ſtreet*, near *Holbourn* in the ſaid county the day of laſt, before you *Richard Peers*, eſq; and *William Naſh*, eſq; ſheriff of our ſaid county, by virtue of our writ of *capias utlagatum* under the ſeal of our court of *King's Bench* to you the ſaid ſheriff directed, whereby we commanded you to inquire what goods and chattels, lands and tenements, *Archibald Scot*, late of the pariſh of St. *Martin in the Fields* in the county of *Middleſex*, had within your bailiwic on the firſt day of *November* laſt paſt, or at any time afterwards, on which day he was outlawed in the ſaid county at the ſuit of *Thomas Deveniſh* in a plea of treſpaſs on the caſe; it was found by the oath of *Stephen World*, and other good and lawful men of the ſaid county, that *Archibald Scot*, in the ſaid writ named, on the firſt day of *November* laſt, on which day he became outlawed, and on the day of taking the ſaid inquiſition, was poſſeſſed, as of his own proper goods and chattels, of and in the ſeveral goods and chattels particularly mentioned and expreſſed in the ſchedule or inventory thereof hereunto annexed, which ſaid goods and chattels were worth to be ſold the ſum of thirty-nine pounds and three ſhillings; all which ſaid goods and chattels you the ſaid ſheriff, by virtue of our ſaid

Vend. expo-nas.

ſaid writ, on the day of taking the ſaid inquiſition did ſeize and take into our hands, as by the ſaid writ and inquiſition taken thereupon tranſcribed into our court of *Exchequer*, and there remaining in the cuſtody of our remembrancer, more fully appears: And being deſirous to be ſatisfied of the value of the ſaid goods and chattels in the ſaid inquiſition mentioned, as is juſt, command you, that you ſell, or cauſe to be ſold, the ſaid goods and chattels and every part thereof, for the beſt price that can be got for the ſame; and at the leaſt for the ſaid ſum of thirty-nine pounds three ſhillings, at which they were appraiſed as aforeſaid, ſo that you have the ſum of money ariſing by ſuch ſale before the barons of our *Exchequer* at *Weſtminſter* the ninth day of this inſtant *February*, then and there to be paid in for our uſe, and that you make then and there diſtinctly and clearly appear to our ſaid barons all that you ſhall do concerning the premiſſes; and have you then and there this writ. Witneſs Sir *Thomas Parker*, knt. at *Weſtminſter*, the third day of *February* in the eighth year of our reign, by the ſaid tranſcript and by the barons.

Maſham.

The return. By virtue of this writ to me directed, I have cauſed the goods and chattels in the ſchedule or inventory hereunto annexed mentioned, to be ſold for the ſum of thirty-nine pounds and three ſhillings, being the beſt price I could get for the ſame, which monies I have before the barons of the King's *Exchequer*

chequer at *Weſtminſter*, on the day within mentioned, ready to pay to his majeſty's uſe according to the command thereof.

The anſwer of
Richard Peers, eſquire,
and
William Naſh, eſquire, } ſheriff.

To the right honourable the lords commiſſioners of his majeſty's treaſury.

The humble petition of Thomas Deveniſh,

Sheweth,

THAT *Archibald Scot*, late of the pariſh of St. *Martin in the Fiels* in the county of *Middleſex*, ſurgeon, being indebted to your petitioner in the ſum of 21 *l.* your petitioner did at his very great charge in *November* laſt proſecute the ſaid *Archibald Scot* to an outlawry, and by virtue of a ſpecial *capias utlagat.* directed to the ſheriff of *Middleſex*, ſeveral goods of the ſaid *Archibald Scot* were ſeized and found by inquiſition to be of the value of 39 *l.* 3 *s.* which goods were afterwards ſold by the ſaid ſheriff by virtue of a writ of *venditioni exponas* at the ſame price and value they were ſo appraiſed at, and the money thereupon raiſed now remains in the hands of the ſheriff of *Middleſex*.

Petition to the lords of the treaſury, that the money may be paid to the plaintiff.

That your petitioner's ſaid debt, and the charge he has already been at, in proſecuting the

the ſaid outlawry, greatly exceeded the ſum ſo remaining in the ſaid ſheriff's hands.

Wherefore your petitioner moſt humbly prays your lordſhips, that the money to be levied as aforeſaid may be paid over to your petitioner:

And your petitioner, as in duty bound, ſhall ever pray, &c.

Thomas Deveniſh.

Whitehall treaſury-chamber, 13th February 1768.

Reference thereon. The right honourable the lords commiſſioners of his majeſty's treaſury are pleaſed to refer this petition to *Thomas Nuttall*, eſq; who is to conſider the ſame, and report to their lordſhips a true ſtate of the petitioner's caſe, together with his opinion what is fit to be done therein.

J. Scrope.

Plaintiff's affidavit of the amount of his debt and charges. *Thomas Deveniſh*, of the pariſh of St. *Martin in the Fields* in the county of *Middleſex*, carpenter, maketh oath, that *Archibald Scot*, late of the ſaid pariſh of St. *Martin in the Fields* in the county of *Middleſex*, ſurgeon, is juſtly and truly indebted to this deponent in the ſum of twenty-one pounds for work done, and materials found by this deponent in his trade of a carpenter for the ſaid *Archibald Scot*, for which debt this deponent did cauſe ſeveral writs ſucceſſively to be iſſued out of his majeſty's court of *King's Bench* againſt the

ſaid

ſaid *Archibald Scot*, and did uſe his utmoſt endeavours to get the ſaid *Archibald* arreſted on each of the ſaid writs: But this deponent not being able to procure any of the ſaid writs to be executed, did cauſe the ſaid *Archibald Scot* to be ſued to an outlawry, and thereupon ſeveral of his goods, to the amount of thirty-nine pounds three ſhillings, to be ſeized into his majeſty's hands, and ſold by virtue of a writ of *venditioni exponas*, as this deponent is informed and believes. And this deponent ſaith, that his attorney's bill for fees and diſburſements in outlawing the ſaid *A. S.* and cauſing his goods to be ſo ſeized and ſold, doth amount unto the ſum of fourteen pounds ſixteen ſhillings and eleven-pence, as appears to this deponent by ſuch bill delivered to him by his ſaid attorney, which bill this deponent, as far as he is capable of judging, believes to be juſt and reaſonable. And this deponent alſo ſaith he hath paid the ſeveral following ſums on account of ſuch outlawry, and which ſums are not included in his ſaid attorney's bill, *viz.* To the ſheriff's officer for executing the writ of *capias utlagatum* 2*l.* 2*s.* To two appraiſers for appraiſing the ſaid goods the ſum of 2*l.* 2*s.* To the ſheriff's officer the further ſum of 2*l.* 16*s.* 6*d.* in part of the ſum of 5*l.* 1*s.* which the ſaid officer demands of this deponent for being fifteen days in poſſeſſion of the ſaid goods in the defendant's houſe, for charges of removing the ſaid goods, and for rent of a room wherein the ſaid goods were depoſited 'till ſold; which ſaid ſeveral ſums of 14*l.* 16*s.* 11*d.* 2*l.* 2*s.* 2*l.* 2*s.* 2*l.* 16*s.* 6*d.* do, together with this

defendant's said debt of 21 *l.* amount unto the sum of 42*l.* 17*s.* 5*d.* besides the fees to be paid in the treasury and other offices in obtaining his majesty's warrant, which this deponent is informed and believes will amount to 10 *l.* more.

Thomas Devenish.

Sworn the 15*th day of* February 1768. *before me at my chambers in the* Temple,

T. Parker.

To the right honorable the lords commissioners of his majesty's treasury.

Report on reference.

May it please your lordships,

IN humble obedience to your lordships commands signified to me by Mr. *Scrope*, I have considered of the annexed petition of *Thomas Devenish*, setting forth, that *A. S.* late of the parish of St. *Martin in the Fields* in the county of *Middlesex*, surgeon, being indebted to him in the sum of twenty-one pounds, he did at a very great charge in *November* last prosecute the said *S.* to an outlawry, and by virtue of a special *capias utlagat.* directed to the sheriff of *Middlesex*, several goods of the said *A. S.* were seized, and found by inquisition, to be of the value of thirty-nine pounds three shillings, which goods were afterwards sold by the said sheriff by virtue of a writ of *venditioni exponas* at the same price and value they were so appraised at, and the money thereupon raised now remains in the hands of the sheriff of *Middlesex*;

that

that the defendant's ſaid debt, and the charges he has already been at in proſecuting the ſaid outlawry, greatly exceed the ſum ſo remaining in the ſaid ſheriff's hands; the petitioner therefore prays your lordſhips, that the monies ſo levied may be paid over to him.

And I do moſt humbly certify to your lordſhips that I have received ſatisfaction as to the truth of all the allegations in the ſaid petition contained, as well by the ſight of the ſeveral records thereby referred unto, and a certificate of the ſaid outlawries being tranſcribed into the office of his majeſty's remembrance of the *Exchequer*, ſigned by Mr. *Henry Ord*, one of the attornies of that office, as by the affidavit of the petitioner; whereby it appears to me, that the ſaid *A. S.* is indebted to the petitioner in the ſum of twenty-one pounds, for work done and materials found by the petitioner in his trade of a carpenter: And it appearing by the affidavit of the ſaid petitioner, that his ſaid debt, with the ſeveral charges he had been already put to in outlawing the ſaid *A. S.* do exceed the ſum levied by the ſheriff; and as the petitioner muſt ſtill neceſſarily be put to a further expence, I am moſt humbly of opinion, that it may be proper for your lordſhips to ſend your warrant to his majeſty's attorney general, authorizing him to conſent to an order of his majeſty's court of *Exchequer*, for *Richard Peers*, eſq; and *William Naſh*, eſq; the preſent ſheriff of the county of *Middleſex* paying over the ſaid ſum of thirty-nine pounds three ſhillings now remaining in their hands (after deducting the ſheriff's poundage for

levying the ſame, and other incident charges) unto the petitioner for his own uſe, towards ſatisfaction of his ſaid debt and coſts whenever a motion ſhall be made in the ſaid court of *Exchequer* for that purpoſe.

All which is neverthelefs moſt humbly ſubmitted to your lordſhips ſuperior judgment.

20*th Feb.* 1768. *Thomas Nuttall.*

George R.

The king's warrant counterſigned by the lords of the treaſury for the attorney general to conſent to the ſheriff's paying 39l. 3s. *levied on a* capias utlagatum *to the proſecutor.*

WHEREAS we are given to underſtand, that there is remaining in the hands of *Richard Peers*, eſq; and *William Naſh*, eſq; the preſent ſheriff of the county of *Middleſex*, the ſum of thirty-nine pounds and three ſhillings, for ſo much levied by him on the ſeveral goods belonging to *Archibald Scot*, which were ſeized into our hands by virtue of an inquiſition taken by virtue of a writ of *capias utlagatum* iſſued out of our court of *King's Bench* againſt the ſaid *Archibald Scot*, at the ſuit of *Thomas Deveniſh*, for the recovery of a debt due and owing to him from the ſaid *Archibald Scot*: and whereas it further appears by reports, certificates, and other proper teſtimonials, which the commiſſioners of our treaſury have laid before us, that the debt due and owing to the ſaid *Thomas Deveniſh* from the ſaid *Archibald Scot*, together with the coſts which he hath been at in carrying on the ſaid proſecution againſt the ſaid *Archibald Scot* for recovery of the ſaid debt, doth exceed the ſaid ſum of thirty-nine pounds and three ſhillings remaining in the hands of the ſaid ſheriff as foreſaid: To the end therefore that the ſaid *Thomas Deveniſh* may

may have and receive ſome recompence and ſatisfaction towards his ſaid debt, and the charges he hath been at in ſuing for the ſame, our will and pleaſure is, and we do hereby authorize and direct you to conſent and agree, that ſo much of the ſaid ſum of thirty-nine pounds and three ſhillings, as doth or ſhall remain in the hands of the ſaid ſheriff (after deducting the uſual poundage for levying the ſame) be paid over to the ſaid *Thomas Deveniſh* towards ſatisfaction of his ſaid debt and coſts accordingly, whenever he by his counſel learned in the law ſhall think fit to move our court of *Exchequer* for an order for that purpoſe; and we do alſo authoriſe and direct you to do, or cauſe to be done, ſuch further or other acts as our ſaid court of *Exchequer* upon ſuch motion ſhall or may judge neceſſary for rendering our intentions herein moſt firm, valid and effectual; and for ſo doing this ſhall be your warrant. Given at our court at St. *James's* the 26th day of *February* 1768. in the eighth year of our reign.

By his majeſty's command.

To our truſty and well beloved *Charles Prat*, eſq; our attorney general.

Newcaſtle.
Hen. Bilſ Legge.
Rob. Nugent.
Beſborough.

Subpœna. *GEORGE* the third, by the grace of God, of *Great Britain*, *France* and *Ireland* king, defender of the faith, *&c.* To *Richard Peers*, eſq; and *William Naſh*, eſq; ſheriff of our county of *Middleſex*, or to their

their under-ſheriff, greeting: We command you, that laying aſide all excuſes, you obey, fulfil and perform all and every matter and thing ſpecified in an order of our court of *Exchequer* at *Weſtminſter*, made in a cauſe in our ſaid court depending between us and *Archibald Scot*, outlawed at the ſuit of *Thomas Deveniſh* upon an outlawry, the tenor of which order for your fuller information therein is hereto annexed: And this you are not to omit under the penalty of one hundred pounds, which we ſhall cauſe to be levied upon your goods and chattels, lands and tenements, for our uſe, if you neglect this our command. Witneſs Sir *Thomas Parker*, knt. at *Weſtminſter*, the nineteenth day of *May* in the eighth year of our reign. By the ſaid order made the ſame day, and by the ſaid barons.

Maſham.

An order to the ſheriff to pay the money to the proſecutor.

It is found in a certain book of orders of this *Exchequer*, to wit, amongſt the orders of *Eaſter* term in the eighth year of the reign of king *George* the third, in the page on the part of this remembrancer as follows:

Monday the 19th day of *May* 1768.

Between the king and *Archibald Scot*, outlawed at the ſuit of *Thomas Deveniſh* upon an outlawry upon the motion of Mr. *Ord* of counſel with *Jane Deveniſh*, widow and adminiſtratrix of *Thomas Deveniſh*, deceaſed, informing the court that the ſaid *Archibald Scot*, having been proſecuted to an

outlawry

outlawry by the ſaid *Thomas Deveniſh* upon an action of treſpaſs upon the caſe in his majeſty's court of *King's Bench*, a writ of outlawry thereupon iſſued againſt the ſaid defendant under the ſeal of the ſaid court, directed to the ſheriff of *Middleſex*, by virtue whereof the ſaid ſheriff ſeized by inquiſition ſeveral goods and chattels belonging to the ſaid defendant, appraiſed at 39*l.* 3*s.* and further informing the court, that the ſaid writ of outlawry and inquiſition being tranſcribed into this court, a writ of *venditioni exponas* under the ſeal of this court iſſued on the 6th day of *February* laſt for ſelling the ſaid goods returnable the 11th day of the ſaid month of *February*, at which time *Richard Peers*, eſq; and *William Naſh*, eſq; the preſent ſheriff of *Middleſex*, returned the ſaid writ, and certified, that they had ſold the ſaid goods and chattels for the ſaid ſum of 39*l.* 3*s.* It was therefore prayed by the ſaid Mr. *Ord*, that the ſaid *Richard Peers*, eſq; and *William Naſh*, eſq; or their under-ſheriff, might forthwith pay to the ſaid *Jane Deveniſh*, adminiſtratrix of the ſaid proſecutor, or her order, the ſaid ſum of 39*l.* 3*s.* towards ſatisfaction of the debt due from the ſaid defendant to the ſaid proſecutor: Whereupon, and on hearing *Charles Prat*, eſq; his majeſty's attorney general, conſenting thereto on behalf of his majeſty, it is ordered by the court as prayed, the ſaid ſheriff firſt deducting out of the ſaid 39*l.* 3*s.* the uſual poundage.

Maſham.

Some of the expences out of pocket in the above proceeding.

	l.	*s.*	*d.*
To the ſheriff for taking the inquiſition	1	15	6
Filing *capias utlagatum*	0	1	0
For the tranſcript two ſkins	1	7	1
Duty on 2 preſſes of parchment	0	2	0
Certificate	0	2	0
Filing tranſcript	0	2	0
Inrolling it	1	0	0
To the maſter of the *Exchequer* office	1	0	0
Rule and ſide-bar motion	10	8	0
Venditioni exponas	0	9	10
Schedule 8 *d. per* ſheet	0	12	0
Return of *venditioni exponas*	0	2	4
Affidavit to lay before the ſolicitor of the treaſury, duty and oath	0	2	0
Certificate of the outlawry from the *Exchequer* office	0	4	4
Fee to the ſolicitor of the treaſury	1	1	0
His clerk	0	5	0
Paid at the treaſury	3	3	0
Attorney general's fee	2	2	0
His clerk	0	2	6
Counſel to move	0	10	6
To the clerk of the *Exchequer* for attending motion	0	3	4
Drawing order	0	5	0
Copy to enter and duty	0	1	10
Entering to the maſter	0	5	4

In-

	l.	s.	d.
Ingroſſing order under ſeal and *ſubpœna*	0	9	0
Filing *venditioni exponas* and return	0	2	0
The clerk of the *Exchequer*'s term fee	0	3	4

Of ſuperſeding an outlawry.

If the defendant has notice that an exigent is iſſued out againſt him, he muſt find out to what ſheriff it is directed, and get a note of it, as the plaintiff's name, his own name and addition, the cauſe of action and return; from this note the filacer will make out a *ſuperſedeas* on the defendant's attorney entering an appearance, which *ſuperſedeas* muſt be carried to the ſheriff to be allowed before the return of the exigent: The expence is as follows:

	l.	s.	d.
Appearance	0	2	0
Superſedeas	0	3	0
Duty	0	1	6
Seal	0	0	7
Allowance by the ſheriff	0	2	4

Superſedeas *to the exigent.*

GEORGE the third, by the grace of God, of *Great Britain*, *France* and *Ireland* king, defender of the faith, *&c.* To the ſheriff of *Middleſex* greeting: Whereas by our writ we have lately commanded you, that you ſhould cauſe *C.K.* late of the city of *Oxford* in the county of *Oxford*, gentleman, to be demanded from county court to county court, until, according to the law and cuſtom of our kingdom of *England*, he be outlawed, if he did not appear; and if he appeared, then

Quia improvide, &c.

then that you ſhould take him and keep him ſafe, ſo that you might have him before us in five weeks from *Eaſter* day, whereſoever we ſhall then be in *England*, to anſwer to *W. L.* of a certain plea of treſpaſs on the caſe, to the damage of the ſaid *William* of forty-eight pounds, as is ſaid: Now for as much as the ſaid *Charles*, * before the iſſuing our ſaid writ of exigent, appeared in our court before us by *Robert Richardſon* his attorney, and often offered to anſwer the ſaid *William* of the plea aforeſaid, our ſaid writ did not duly iſſue; we therefore command you, that you forbear all further demanding the ſaid *Charles*, or outlawing, taking, or any way moleſting him on that occaſion; and have there this writ. Witneſs *William* lord *Mansfield*, at *Weſtminſter*, the ninth day of *May* in the 8th year of our reign.

Richardſon. *Adams.*

Proceedings againſt peers, &c.

If the defendant be a peer, or a body corporate, the ſheriff is to ſummons the party on the original, and if the defendant does not appear, the filacer makes out a *diſtringas* againſt the defendant's lands and chattels; whereupon the ſheriff returns iſſues to the value of, *&c.* and then you have an *alias diſtringas*, and *plur. diſtringas ad infinitum*, 'till the defendant do appear; and if the ſheriff return but ſmall iſſues, the court on motion will

* Notwithſtanding it is here ſuppoſed that the defendant appeared before the exigent iſſued, the fact is ſeldom ſo; for it is ſufficient if the appearance be any time before the return of the exigent.

will order him to return better; and these issues are to be estreated into the court of *Exchequer*, and levied on the defendant's lands and chattels to the king's use by way of forfeiture.

Proceedings relating to attornies.

YOU are not to arrest an attorney, be the cause of action what it may, he being always supposed to be in court; but you must file a bill against him with the clerk of the declarations written on parchment, with a double penny stamp, and deliver him a copy of it on double penny stamped paper, and give a rule for him to plead thereto.

Bill against an attorney not to be filed in the vacation.

A person privileged in court shall not have an imparlance, neither can a bill be filed against him in vacation, because it cannot have reference to the precedent or subsequent term; but it must be filed *sedente curia*; and if there be a joint cause of action against an attorney and another person, you cannot declare as against one in person, and the other by bill, but against both, as *in custodia*. Comb. 465. Salk. 544. 12 Mod. 163.

Of suing an attorney jointly with another.

Privilege of the Common Pleas *may be pleaded after bail.*

If an attorney of the *Common Pleas* be sued in this court, he doth not waive his privilege by filing bail, but may plead his privilege to that action, or any other action, on a declaration filed against him in the same term by the by.

Privilege waived by pleading in chief to another action.

If he waives his privilege by pleading in chief to the first action, it is a waiver in all other actions commenced against him in that term.

Attorney C. B. in custod. mar. *cannot plead his privilege.*

If an attorney of the *Common Pleas* be in actual custody of the marshal of the court of *B. R.* by process, he cannot plead his privilege in any action on any bill filed against him.

Attorney C. B. *sued by an attorney* B. R. *loses his privilege.*

If an attorney of *C. B.* be brought into the court of *B. R.* at the suit of an attorney there, which is an estoppel to the defendant's privililege, even in such case the defendant shall be ousted of his privilege in all other actions commenced against him *in banco regis* in the same term, because the jurisdiction of this court was attached upon him by the first action. *Pasch.* 8 *W.* 3. *B. R. Bands* v. *Bodinner*, *Carth.* 377.

Attorney suing or sued jointly, or in auter droit, *loses his privilege.* 12 Mod. 316.

An attorney cannot have his privilege but where he sues or is sued singly, and in his own right, or on his own account, and not where he sues or is sued jointly, or in *auter droit*, as executor, *&c.*

The form of a bill against an attorney.

Bill against an attorney.

Middlesex. A. B. complains of *C. D.* gent. one of the attornies of the court of our lord the king before the king himself, being present here in court in his proper person, for that, to wit, that whereas [the rest as in other declarations

declarations to] And thereupon he brings ſuit, &c. Andr. 247.

R. R. for the plaintiff. Defendant in perſon.	Pledges of proſeccuting,	*John Doe*, and *Richard Roe.*

Of *Hilary* term in the eighth year of the reign of our ſovereign lord *George* the third, &c.

Declaration againſt the defendant, as *clericus domini regis coram ipſo rege.* Plea, that he was a filacer of the court, *abſque hoc*, that he was *clericus domini regis coram ipſo rege*; Demurrer. *Curia:* A filacer is a clerk of the court, and may be ſued by that name. Judgment *quod reſpondeat ulterius.* Trin. 5 Geo. 2. B. R. Donſet *v.* Hayward. *Of declaring againſt a filacer.*

An attorney of this court ſues by original, and declares in *propria perſona* upon his privilege *ſecundum conſuetudinem curiæ. Per cur':* The declaration is naught, declaring in this manner by privilege on original, for the privilege of attornies is in ſuits by bill: But when they ſue by original, they muſt declare as others do in common form. 2 *Lev.* 39. *Attorney cannot have privilege if he ſues by original.*

If the bill be filed, and a copy thereof delivered four days excluſive before the end of the term, including *Sunday* as one, the defendant muſt plead as of that term, the plaintiff having entered a rule to plead, and demanded a plea; but if the bill be not filed, and a copy delivered within that time, the defendant is intitled to have an imparlance. *What time an attorney has to plead.*

If

If an attorney be plaintiff, he makes out an attachment of privilege in this form.

Attachment of privilege for an attorney.

GEORGE the third, by the grace of God, of *Great Britain*, *France* and *Ireland* king, defender of the faith, *&c.* To the ſheriff of *Middleſex* greeting: We command you, that you attach *C. D. E. F. G H.* [you may put in as many as you have occaſion] if they may be found in your bailiwic, and ſafely keep them, ſo that you may have their bodies before us at *Weſtminſter*, on next after to anſwer *A. B.* gentleman, being one of the attornies of our court before us, according to the liberties and privileges for ſuch attornies and other miniſters of the ſame court, from the time whereof the memory of man is not to the contrary, uſed and approved in the ſame, in a plea of treſpaſs; and have there then this writ. Witneſs, *&c.*

You pay the chief clerk nothing for ſigning this writ, but the ſealer takes 7 *d.* for the ſeal.

Præcipe *to be left on ſigning attachment.*

Every attorney of this court, who ſhall ſue out any attachment of privilege againſt any defendants, ſhall leave a *præcipe* with the ſigner of the writs, with the defendants names, not exceeding four in each writ, with the return and day of ſigning ſuch writ, with the agent's or attorney's name who ſued out the ſame; and all ſuch *præcipes* ſhall be entered on the roll, where the *præcipes* of *latitats*, and all other writs iſſuing out of this court, are entered; and the officer who ſigns the writs in this court ſhall not ſign ſuch attachment

But four defendants in one attachment.

tachment 'till a *præcipe* be left with him for that purpoſe. *Hil.* 20 *Geo.* 2.

An attachment of privilege is but as a *latitat*, and not as an original. 1 *Show.* 367. *Attachment no original.*

The *ſtat.* 13 *Car.* 2. *ſtat.* 2. *c.* 2. which enacts, that no perſon, who ſhall be arreſted by colour of any proceſs in which the cauſe of action is not particularly expreſſed, and for which the defendant is bailable by the *ſtat.* 23 *H.* 6. *c.* 10. ſhall be compelled to give ſecurity for appearance in any penalty exceeding 40 *l.* does not by the expreſs words of the ſtatute extend to an attachment of privilege, but ſuch courſe ſhall be taken thereupon for ſecurity for appearance as hath been uſed. *Whether an acetiam neceſſary.*

But now there ſeems occaſion for an *ac etiam billæ* in an attachment of privilege from this court, as well as in any other writ, in caſe the defendant is to be arreſted.

An attachment of contempt was granted againſt the plaintiff's attorney, for putting to the proceſs the name of an attorney of this court, without authority. *Bur. Rep.* 20.

The only attachments of contempt that can be moved for the laſt day of the term, are, for non-payment of coſts, or againſt a ſheriff for not returning a writ. *Bur. Rep.* 651.

If the attorney delivers his declaration four days excluſive before the end of the term, the defendant muſt plead as of that term. *What time a perſon ſued by an attorney has to plead.*

If an attorney delivers his declaration four days excluſive before the end of the term in which the attachment was returnable, and enters a rule to plead, and demands a plea, the defendant ſhall be obliged to plead as of that term; and if he does not deliver his declaration *When to deliver his declaration.*

tion

tion in that time, the defendant will have an imparlance; and if he does not deliver his declaration before the eſſoin-day of the ſubſequent term, the defendant will have an imparlance to the term next following.

Of writs of habeas corpus *and* certiorari, *and proceedings thereon.*

Proceedings by habeas corpus.

WRITS of *habeas corpus* are of various ſorts, and for ſeveral purpoſes, as where a defendant is arreſted by the ſheriff, either on meſne proceſs, or on an execution, he may, to avoid going to the county gaol, or to get out if already in it, remove himſelf by *habeas corpus* into the *King's Bench* priſon, and enjoy the benefit of the rules, which are very ſpacious and open, on giving ſecurity to the marſhal.

Prax. U. B. 1. *When returnable immediately, and when not.*

A writ of *habeas corpus* to remove the body of a priſoner, directed to the ſheriffs of *London* or *Middleſex*, the judge of the *Marſhalſea* court, or other inferior court within five miles of *London*, may be granted in vacation or term-time, returnable immediately; but if the *habeas corpus* be directed to any other ſheriff or court farther diſtant, it muſt be returnable at a certain day in court, unleſs it be to deliver over a priſoner in diſcharge of his bail.

Habeas corpus *to inferior courts after judgment,*

If upon any *certiorari* or *corpus cum cauſa*, it be returned that the priſoner is condemned by judgment, he ſhall be remanded, and remain

main in prison without being let to bail against the will of the plaintiffs, until satisfaction be made them of the sums adjudged. *Stat.* 2 *Hen.* 5. *stat.* 1. *c.* 2. *party to be remanded.*

No *habeas corpus*, or other writ, sued out of any of the courts at *Westminster*, to remove any cause depending in any court, shall be allowed, except the said writ be delivered to the judge or officer before the jury have appeared, and one of the jury sworn. *Stat.* 43 *Eliz. c.* 5. §. 2. 3 *Car.* 1. *c.* 4. & 16 *Car.* 1. *c.* 4. Habeas corpus *not to be allowed unless delivered before jury sworn.*

No *habeas corpus*, *certiorari*, or other writ or process (other than writs of error and attaint, to be sued out of his majesty's courts at *Westminster*, &c. to stay or remove any cause depending in any court of record, which shall have jurisdiction to hold plea in that cause, shall be received or allowed, except the said writs be delivered to the steward, judge or officer before issue or demurrer joined, so as the said issue or demurrer be not joined within six weeks next after the arrest or appearance. *Stat.* 21 *Jac.* 1. *c.* 23. §. 2. *Or before issue joined.* Carth. 69. 2 Bur. Rep. 759. *So as it be not joined within 6 weeks after arrest.*

If any such cause shall be removed or stayed by any such writ or process, and afterwards the same cause shall be remanded, the same cause shall never afterwards be removed or stayed before judgment by any writ whatsoever. *Same stat.* §. 3. *Cause remanded not to be removed again before judgment.*

If in any cause not concerning freehold, lease or rent, it shall appear or be laid in the declaration, that the debt, damages, or things demanded, do not amount to 5 *l.* such cause shall not be stayed nor removed into any other court *Causes not exceeding* 5 l. *not to be removed.*

court by any writ, other than writs of error or attaint. *Same ſtat.* §. 4.

Writs contrary to this act not to be allowed.

If any writs ſhall be ſued forth contrary to the intent of this act, the judge or officer to whom ſuch writs ſhall be directed may diſallow the ſame, and proceed as if no ſuch writs had been granted. *Same ſtat.* §. 5.

To what courts this act extends.

Provided that this act ſhall extend only to ſuch courts of record, and for ſo long time only as there ſhall be an utter barriſter of three years ſtanding, that ſhall be ſteward, town-clerk, judge, or recorder of the ſame court, or that ſhall be aſſiſtant to ſuch judge, and there preſent, and not of counſel in any cauſe then depending in the ſame court. *Same ſtat.* §. 6.

Nor to any cauſe where the plea not triable in the inferior court.

This act ſhall not extend to any cauſe wherein any ſuch plea ſhall be pleaded as could not be tried within the juriſdiction of ſuch inferior court. *Same ſtat.* §. 7.

Inferior courts may proceed in cauſes not exceeding 5 l. *tho' there be actions for above* 5 l.

The judges of ſuch inferior courts, as are deſcribed in the above ſtatute of 21 *Jac.* 1. may proceed in cauſes therein ſpecified, which appear or are laid not to exceed 5 *l.* though there may be other actions againſt ſuch defendants, wherein the plaintiff's demands may exceed 5 *l.* *Stat.* 12 *Geo.* 1. *c.* 29. §. 3.

Charges to be tendered the ſheriff.

The ſheriff upon a *habeas corpus* is not bound to bring up the priſoner, unleſs reaſonable charges be tendered him. *Cox* and *Dowl, Hil.* 20 & 21 *Car.* 2.

Habeas corpus to the Cinque Ports.

Said that a *habeas corpus* at the king's ſuit lies to the *Cinque Ports*, but not at the ſuit of a ſubject. *Pamphlet*'s caſe, *Mich.* 21 *Car.* 2. *Sed vide Alder* and *Puſie*'s caſe *in ſcacc. Trin.* 23 *Car.*

23 *Car.* 2. & *Pell's* caſe, *Hil.* 25, 26 *Car.* 2. 3 *Keb.* 279. *Trem.* 360.

Habeas corpus cum cauſa to the portreeve of *Yeovil* in *com. S.* who returns *quod ante adventum iſtius brevis* the party was bailed: It was moved by the plaintiff's counſel, that the portreeve might make a better return; and ruled that he ſhould, for though the body be bailed, he ought to return the cauſe, and ſometimes it is added *corpus tamen* he cannot have at the day, *quia traditur in ballium*, and he cannot be bailed after the *habeas corpus* received. *Salmon* and *Slade*, *Hil.* 25 & 26 *Car.* 2. 2 *Keb.* 450. 1 *Sid.* 386.

Tho' defendant bailed, cauſe ſhould be returned.

Cannot be bailed below after habeas corpus *received.*

The defendant is arreſted by proceſs out of *Exeter* court *in placito tranſgr' ſuper caſum*, bail is given, the plaintiff declares, and the cauſe is removed by *habeas corpus*; then the plaintiff delivers two declarations, one for words, and another for money, *ſur aſſumpſit*. *Hale*, That if the party have declared before the *habeas corpus* delivered, the bail ſhall be ſpecial only as to that action, and ſhall be common bail to the other action; but if no declaration, then the bail put in upon the *habeas corpus* ſhall be ſpecial bail to all actions of the plaintiff againſt the defendant of that term, and the plaintiff cannot declare before the *habeas corpus* allowed. *Serle* and *Newton*, *Hil.* 25, 26 *Car.* 2.

Where bail on a habeas corpus *ſhall be ſpecial to all actions of the ſame plaintiff in the ſame term.*

Cannot declare before habeas corp. *allowed.*

Habeas corpus to remove a cauſe out of *London*, the plaintiff prays a *procedendo*, becauſe the action is for calling a woman *whore*, which is not actionable elſewhere. The defendant's counſel alledged, that neither of the parties lived in *London*, nor were the words

Where cauſe ſhall be removed out of London, *tho' the matter only actionable there.*

ſpoken there. *Hale:* If the words were not ſpoken there, you ſhall have no *procedendo*, for elſe you might make the words actionable all over *England*, laying them in *London*. Anonymus, Mich. 27 Car. 2. 2 Roll. Abr. 69. Vide Carth. 75. Watſon *v.* Clerke.

Cannot put in bail 'till hab. corp. *returned.*

Habeas corpus to remove a cauſe out of an inferior court, and the plaintiff making ſearch finds bail, but the *habeas corpus* not being returned and filed, the bail ſignified nothing, and therefore he carried the cauſe back by *procedendo*; and of this the defendant complained to the court; but ruled that the defendant can't put in bail 'till the *habeas corpus* be returned. *Maſters* and *Bruges*, *Mich.* 20 *Car.* 2.

When habeas corpus *muſt be on motion.*

A *habeas corpus* ought to be on motion where the party is committed for a crime. 1 *Lev.* 1.

After habeas corpus, *proceedings in inferior court void.*

A writ of *habeas corpus* ſuſpends the power of the inferior court, ſo that if they proceed after, the proceedings are void, *& coram non judice.* 1 Salk. 352. Cro. Car. 261. 2 Jones 209. 2 Mod. 195.

On habeas corpus, *proceedings here are* de novo, *and all below at an end.*

By the *habeas corpus* the proceedings in the court below are at an end, and the proceedings in the ſuperior court are *de novo*, *and* bail muſt be put in *de novo.* Skinner 244.

After plea in inferior court, defendant a feme marries, and on a habeas corpus *pleads here her coverture.*

Debt againſt a feme ſole in the palace court, who after ſhe had pleaded there married, and then removed the cauſe by *habeas corpus* into *B. R.* and there pleaded her coverture in abatement; the court ſaid, that if this matter had been moved on the return of the *habeas corpus*, they would have granted a

procedendo, but that now the plea in abatement must be held good, for the proceedings are *de novo*, and they could take no notice of the proceedings below. 1 *Salk.* 8. 2 Str. 811. Ld. Raym. 1525. Bardard. K. B. 70.

After interlocutory judgment, and before final judgment, a *habeas corpus cum causa* was brought, and before the return of the writ the defendant died, and a *procedendo* was awarded, because by the *ſtat.* 8 & 9. *W.* 3. *c.* 11. the plaintiff may have a *ſcire facias* againſt the executors, which he cannot have in another court. 1 *Salk.* 352. Habeas corpus *after interlocutory judgment, defendant dies before the return of the writ, a* procedendo *awarded.*

The form of a habeas corpus cum cauſa, *returnable before the chief juſtice immediately.*

GEORGE the third, by the grace of God, of *Great Britain*, *France* and *Ireland* king, defender of the faith, *&c.* To the ſheriff of *Middleſex* greeting: We command you, that you have the body of *C. D.* detained in our priſon under your cuſtody, as it is ſaid, under ſafe and ſecure conduct, together with the day and cauſe of his being taken and detained, by whatſoever name he may be called in the ſame, before our right truſty and well beloved *William* Lord *Mansfield*, our chief juſtice aſſigned to hold pleas in our court before us, at his chamber ſituate in *Serjeants Inn* in *Chancery-lane*, immediately after the receipt of this writ, to do and receive all and ſingular thoſe things which our ſaid chief juſtice ſhall then and there conſider

ſider of him in this behalf; and have there then this writ. Witneſs, &c

You ingroſs this writ upon a 5*s.* ſtamped piece of parchment: *N. B.* Affidavit not neceſſary.

Of ſuing out a habeas corpus, and getting it allowed.

Then make a note for the office, and carry the writ to the ſigner of the writs, who will ſign the writ, and keep the note. You pay him 6*s.* 8*d.* in term-time, and 7*s.* 8*d.* in vacation, which is thus divided:

The fees.

	l.	*s.*	*d.*
To the chief clerk —— ——	0	1	8
To the judge —— ——	0	4	0
To the judge's clerk in term 1*s.* in vacation 2*s.* ——	0	2	0

Then get it ſealed, for which you pay 7*d.* Then you lodge the writ with the ſheriff in *Middleſex*. The fees are, if the defendant be charged but with one action, 9*s.* 4. *viz.*

	l.	*s.*	*d.*
Allowing the writ —— ——	0	4	8
For the return, if but one action	0	2	4
If more, 2*s.* 4*d.* for each action.			
For a warrant to the bailiff to carry the priſoner before the judge —— ——	0	2	4

And if the defendant be in *Newgate*, then for a warrant to the keeper to deliver him to the bailiff, 2*s.* 4*d.* more.

If

If the defendant be not charged in cuſtody of the ſheriff with ſome proceſs out of this court, he cannot be turned over; and therefore in ſuch caſe the defendant muſt procure ſome creditor to ſue out a writ againſt him in this court, and lodge it with the ſheriff before he brings his *habeas corpus*.

Defendant muſt be charged with ſome proceſs of this court, or cannot be committed.

When the *habeas corpus* is returned by the ſheriff, the bailiff brings the defendant to the judge's chamber, who commits him to the *King's Bench* priſon. You pay

Fees on commitment at the judge's chamber.

	l.	*s.*	*d.*
To the bailiff for bringing up the defendant	0	10	0
To the judge's clerk at the chambers as follows, *viz.*			
For himſelf	0	4	0
For the chaplain of the priſon	0	2	0
For the deputy marſhal	0	1	0
For the clerk of the papers of the priſon	0	1	0
For the porter of the *Serjeants Inn*	0	0	6

To the tipſtaff for carrying the priſoner over 6*s.* 8*d.*

If returnable in court,

	l.	*s.*	*d.*
Judge's clerk	0	4	0
Secondary	0	2	0
Deputy marſhal	0	2	0
Chaplain	0	2	0
Clerk of the papers	0	1	0
Cryer	0	0	6
Tipſtaff	0	10	0

Writ and return to remain with the ſecondary or judge's clerk, and a note thereof made by the party, and ſigned by the judge or ſecondary to be delivered to the marſhal.

Where any perſon ſhall be brought into court upon a *habeas corpus* or before a judge, in order to be committed to the cuſtody of the marſhal, the writ, with the return, ſhall be left with the ſecondary or judge's clerk to be filed, and a copy or note of ſuch return of the writ, under the hand of the judge or ſecondary, ſhall be delivered to the marſhal at the time of the commitment of ſuch perſon to his cuſtody; and ſuch copy or note ſhall be prepared by the perſon proſecuting ſuch writ of *habeas corpus*, or by his attorney. *Trin. 3 Annæ.*

For allowing a *habeas corpus* to the palace court you pay 4*s.* 8*d.* and for the *jurat* 4*d.*

The form of a bail-piece on a habeas corpus.

Hilary term in the eighth year of king *George* the third.

Middleſex (*to wit*) A. B. *is delivered on bail upon a* habeas corpus.

To John Doe *of* London, *Gent.*
and
Richard Roe, *of the ſame, Gent.*

G. T. *attorney* } *At the ſuit of the plaintiff in the plaint.*

		l.	*s.*	*d.*
Duty		0	2	0
Maſter of the office		0	4	10
Judge's clerk in term 1*s.* 2*d.* In vacation 2*s.* 2*d.*		0	2	2
Porter of *Serjeants Inn*		0	0	6

Every perſon committed to the cuſtody of the marſhal by virtue of a *habeas corpus*, ſhall remain in actual cuſtody of the marſhal by the ſpace of two days next after ſuch commitment, notwithſtanding any other *habeas corpus* from any other court whatſoever. *Hil.* 5 *W.* & *M.*

Perſons committed to the cuſtody of the marſhal on habeas corpus *to remain 2 days notwithſtanding any other* habeas corpus.

As to the ſtile of inferior courts.

If the *habeas corpus* be to remove a cauſe out of an inferior court, you muſt learn the ſtile of the court, for which ſee *Theſaurus Brevium*. The direction to the *Marſhalſea* court is, "To the judges of our "court of our palace of *Weſtminſter*, and "to each of them, greeting." To the court of ſheriffs of *London*, "To the "mayor, aldermen and ſheriffs of *London* "greeting."

Cauſe not to be removed where the cauſe of action does not exceed 5 l.

Where the cauſe of action in the inferior court did not amount to 5 *l.* or upwards, it was not removeable by a *habeas corpus*; and therefore in ſuch caſe the defendant uſed to ſet up a fictitious action againſt himſelf for a pretended demand of 5 *l.* or upwards, and then bring a *habeas corpus*, and remove both cauſes together, and thereby remove the ſmalleſt actions into the ſuperior courts; for preventing which abuſes, by *ſtat.* 12 *Geo.* 1. *c.* 29. the judge of the inferior courts, mentioned in *ſtat.* 21 *Jac.* 1. *c.* 23. may proceed in ſuch actions as are therein ſpecified, which appear or are laid not to exceed 5 *l.* although there be other actions againſt the defendant, wherein the plaintiff's demands ſhall exceed the ſaid ſum of 5 *l.*

Habeas corpus *to remove a cauſe, to be returnable on a day certain except.*

Writs of *habeas corpus* to remove cauſes out of inferior courts, (except courts within 5 miles of *London*, as the ſheriff's court in *London*, *Marſhalſea* court, *&c.*) ſhall be made returnable at a certain day in term, and not immediately.

Of what return ſuch habeas corpus *to be made.*

And every ſuch writ that ſhall be ſued out in *Hilary* or *Trinity* term, or the beginning of the vacation following, ſhall be made returnable

turnable on the firſt or ſecond return of the ſubſequent term, and if returnable in *Hilary* or *Trinity* term, ought to be made returnable the firſt or ſecond return of thoſe terms; and if returnable later, any judge of the court may grant a *procedendo*, as tending to the plaintiff's delay.

The form of a procedendo.

GEORGE the third, by the grace of God, of *Great Britain*, *France* and *Ireland* king, defender of the faith, *&c.* To the mayor, aldermen and ſheriffs of *London* greeting: Although we lately by our writ commanded you, that you ſhould have the body of *C. D.* detained in our priſon under your cuſtody, as it was ſaid, under ſafe and ſecure conduct, together with the day and cauſe of his being taken and detained, by whatſoever name the ſaid *C. D.* might be called in the ſame, before our right truſty and well beloved *William* lord *Mansfield*, our chief juſtice aſſigned to hold pleas in our court before us, at his chambers ſituate in *Serjeants Inn* in *Chancery Lane*, immediately after the receipt of that writ [as the *habeas corpus* was returnable] to do and receive all and ſingular thoſe things which our ſaid chief juſtice ſhould then and there conſider of him in that behalf; yet we being now moved with certain cauſes in our court before us, command you and every of you, that in all plaints or ſuits againſt the ſaid *C. D.* at the

ſuit of *A. B.* in our court, before you or any of you levied or affirmed, or before you or any of you now depending undetermined, you proceed with what ſpeed you can in ſuch manner, according to the law and cuſtom of *England*, as you ſhall ſee proper; our ſaid writ to you thereupon firſt directed to the contrary in any thing notwithſtanding. Witneſs, *&c.*

Special bail in cauſes removed by habeas corpus, *except.*

Special bail is required in all cauſes removed by *habeas corpus* out of inferior courts except the defendant be an executor or adminiſtrator, or the action be for words or ſmall treſpaſſes. *Hil. 2 Jac. 2.*

Executor ſhall not put in ſpecial bail on a habeas corpus, *tho' bail put in below.*

The defendant was ſued in the palace court as executor, and there compelled to find bail according to the courſe of that court: He removes the cauſe by *habeas corpus*; and the queſtion was, Whether he ſhould find ſpecial bail here; and reſolved he ſhould not: For though it be generally uſed, that when a cauſe is removed by *habeas corpus* to find bail in all caſes where bail is found in the inferior court, yet this ſhall not extend to the caſe of an executor where the cauſe did not require ſpecial bail by the courſe of the court, except in caſe of a *devaſtavit*. But in other caſes where ſpecial bail is found below, it ſhall be found here, although the cauſe of action be of a leſs ſum than by the courſe of this court ſpecial bail is to be found. 1 *Lev.* 268.

Nor an heir at law.

Debt in *London* againſt the defendant as heir at law being removed hither, the queſtion was, If the heir ſhould find bail here as he

he did in the inferior court of *London*, where they compel all defendants, heirs or executors, to find bail. The court denied to hold the defendant to ſpecial bail in this caſe. 2 *Lev.* 204.

Upon the allowance of any *habeas corpus*, the plaintiff may in term-time have a rule for a *procedendo*, unleſs good bail be put in within four days next after notice of the rule, and in vacation may have a rule or warrant for a *procedendo*, unleſs good bail be put in within ſix days next after notice of ſuch rule or warrant. *Procedendo unleſs bail in term within 4 days, and in vacation within 6 days after notice.*

No bail is to be tendered or put in upon any *habeas corpus*, until the *habeas corpus*, and cauſes for which bail is to be put in, be returned, to the end it may appear what the cauſes are for which the defendant is detained, and bail may be duly taken, and the *habeas corpus* and bail duly filed. *Mich.* 1651. *Paſ.* 29 *Car.* 2. *Hil.* 10 *W.* 3. *No bail on* habeas corpus *'till the writ be returned.*

When ſpecial bail is put in before any judge of this court *de bene eſſe*, upon a writ of *habeas corpus*, if the plaintiff ſhall not except againſt the bail within twenty-eight days after putting in the ſame, the bail ſhall be filed within four days next after the end of the ſaid twenty-eight days. *Mich.* 16 *Car.* 2. *Twenty eight days to except againſt bail on* habeas corpus.

And the like notice in writing is to be given of putting in or excepting to bail on a *habeas corpus*, as on a *cepi corpus*. *Notice of putting in or excepting to bail to be in writing.*

And if the plaintiff except to ſuch bail put in *de bene eſſe*, he may have a rule or warrant for a *procedendo*, unleſs the defendant ſhall put in better bail within four days after ſervice *After exception, rule for* procedendo *within 4 days, unleſs better bail, whether*

in term or vacation.

service of such rule or warrant, whether it be in term or vacation.

On a removal out of an inferior jurisdiction, the plaintiff is bound to accept the bail below, except in London.

If a cause be removed by *habeas corpus* out of the *Marshalsea* or any other inferior court, and the bail there offer to be bail to the action here, the plaintiff is compellable to take them, because he might, but did not except to them below. *Aliter*, where a cause comes hither out of *London*, for the sufficiency of the bail there, is at the peril of the clerk, and he is responsible to the plaintiff, so that the plaintiff had not the liberty of excepting against them, and the clerk is not responsible if they be deficient in this court, though he was in *London*. 1 Salk. 97.

Bail liable to all actions in the return of the habeas corpus *declared on within two terms.*

If one be brought into this court by *habeas corpus*, and puts in bail, the bail is liable to all actions at the suit of the plaintiff or plaintiffs mentioned in the return of the *habeas corpus*, wherein he or they shall declare against the defendant at any time within two terms next after.

Defendant in custody not to be discharged 'till bail is perfected.

Defendant returned in custody on a *habeas corpus* or *cepi corpus*, is not to be discharged until the bail is perfected.

Record not removed by habeas corpus.

The record itself is never removed by a *habeas corpus*, as it is on a *certiorari*, but remains below; and therefore if a cause be removed hither by *habeas corpus*, the plaintiff here must begin *de novo*, and declare against the defendant as *in custodia mareſcalli*. Salk. 352.

Plaintiff must declare de novo.

Plaintiff must declare within two terms.

The plaintiff must declare before the end of the second term, after the return of the *habeas corpus*, and the defendant will not be bound to plead to any declaration delivered after that time.

And

And where the defendant has removed his cauſe hither by *habeas corpus*, and put in bail, he cannot have a *non-proſs* againſt the plaintiff for want of a declaration, if he will not declare, the plaintiff not being in court, and the cauſe ſuppoſed to be removed againſt his inclination.

Cannot be non-proſs'd for want of a declaration.

If a cauſe be removed by *habeas corpus* out of an inferior court, lying in any city or town where the judges of aſſiſe ſeldom go, as *Canterbury*, *Southampton*, *&c.* and the action be tranſitory, it ſhall be laid in the county wherein ſuch city or town is, as *Kent*, *Southampton*, *&c.*

Cauſe removed from city, &c. where the judges of aſſiſe ſeldom go, to be laid in the county wherein the city lies.

If a cauſe be removed out of *London* or *Middleſex*, the *Marſhalſea*, or any other court within five miles of *London*, in *Hilary* or *Trinity* term, and bail is put in, and the plaintiff declares in *London* or *Middleſex*, and delivers his declaration ſix days before the end of the term, the defendant ſhall plead three days before the eſſoin-day of the ſubſequent term, that the plaintiff may enter the iſſue if he will; but if the plaintiff does not deliver his declaration ſix days before the end of the term, the defendant ſhall have an imparlance 'till the next term.

What time the defendant has to plead in Hilary *or* Trinity *term, and the action in* London *or* Middleſex.

1 Mod. 1.

If a cauſe is removed out of any court, except in *London* or *Middleſex*, the *Marſhalſea* or other court within five miles of *London*, and the plaintiff does not declare in *London* or *Middleſex*, but in ſome other county, and the plaintiff delivers his declaration at any time before the end of theſe terms, *viz. Hilary* or *Trinity*, the defendant is bound to plead

What time in theſe terms, if action in any other county.

plead by the time the rule is out, that the plaintiff may try his cauſe at the aſſiſes if he thinks proper; and if the defendant does not plead by that time, judgment may be entered againſt him.

What time to plead in Michaelmas *or* Eaſter *term.*

Upon a *habeas corpus* returnable in *Michaelmas* term, if the declaration be delivered before *craſtinum animarum*, in *Eaſter* term if delivered before *menſem Paſchæ*, and the action is laid in *London* or *Middleſex*, the defendant muſt plead to trial the ſame term. But if delivered after theſe reſpective times, and yet ſix days before the end of either of theſe terms, the defendant, wherever the action is laid, ſhall plead to enter three days before the eſſoin-day of the ſubſequent term; and if not delivered ſix days before the end of either of theſe terms, the defendant has an imparlance until the next term.

Salk. 515.

Practice various ſince rule Trin. 5, 6 Geo. 2.

Since the making the rule of *Trinity* the 5th and 6th of his late majeſty, the attornies have differed as to the method of proceeding, ſome adhering to the old practice, and others following that rule as on a *cepi corpus*.

Plea in abatement when to be pleaded.

A plea in abatement on *habeas corpus* muſt be pleaded before the rule for pleading is out.

How to proceed againſt a priſoner in the Fleet, *charged with a declaration, removing himſelf to the* King's Bench *priſon.*

If a priſoner in the *Fleet*, charged with a declaration of the *Common Pleas*, remove himſelf by *habeas corpus* to the cuſtody of the marſhall the plaintiff muſt proceed to judgment in the court of *Common pleas*, and then may carry him back by *habeas corpus ad ſatisfaciendum* to charge him in execution; and

ſo

ſo if a priſoner in the cuſtody of the marſhal be charged with a declaration in this court, and he removes himſelf to the *Fleet*, the plaintiff muſt proceed to judgment in this court, and then bring the defendant back by *habeas corpus ad ſatisfaciendum* to be charged in execution in this court: But if a perſon in cuſtody on proceſs iſſuing out of this court remove himſelf to the *Fleet* by *habeas corpus* before the plaintiff has declared againſt him, in ſuch caſe (as I take it) the plaintiff muſt charge him with a declaration in the court of *Common Pleas*, and cannot proceed any further in this court, unleſs he has a mind to bring the defendant back into this court by *habeas corpus ad reſpondendum*.

How on the like removal from the marſhal to the Fleet.

How on a removal before the plaintiff has declared.

On *habeas corpus ad ſatisfaciendum* the plaintiff's attorney ſhould indorſe the term and number of the judgment roll.

Of proceedings againſt priſoners.

FOrmerly when any defendant was detained in cuſtody by meſne proceſs of this court for want of bail, if the plaintiff did not within two terms after the arreſt cauſe the defendant to be brought up by *habeas corpus* and committed, ſo that he might declare againſt him *in cuſtodia mareſcalli*, the defendant might be diſcharged out of cuſtody upon common bail or appearance.

The antient practice.

Stat. 4 & 5 W. & M. c. 21. *For delivering declarations againſt priſoners.*

But by *ſtat.* 4 & 5 *W.* & *M. c.* 21. if any defendant or defendants be taken or charged in cuſtody at the ſuit of any perſon or perſons upon any writ or wirts out of any of the courts at *Weſtminſter*, and impriſoned or detained in priſon for want of ſureties for their appearance to the ſame, the plaintiff or plaintiffs in ſuch writ or writs may, before the end of the next term after ſuch writ or proceſs ſhall be returnable, declare againſt ſuch priſoner or priſoners in the court out of which the writ or wits ſhall iſſue; whereupon the ſaid priſoner or priſoners ſhall be taken and impriſoned or charged in cuſtody, and may cauſe a true copy thereof to be delivered to ſuch priſoner or priſoners, or to the gaoler or keeper of the priſon, or gaoler in whoſe cuſtody ſuch priſoner ſhall be or remain; to which declaration or declarations the ſaid priſoner or priſoners ſhall appear and plead; and if ſuch priſoner or priſoners ſhall not appear and plead to the ſame, the plaintiff or plaintiffs in ſuch caſe ſhall have judgment in ſuch manner as if the priſoner had appeared in the ſaid court, and refuſed to anſwer or plead to ſuch declaration.

To be alledged in the declaration, in whoſe cuſtody ſuch priſoner is.

That in all ſuch declarations againſt any priſoner or priſoners detained in priſon by virtue of any writ or proceſs out of this court, it ſhall be alledged in cuſtody of what ſheriff, bailiff or ſteward of any franchiſe, or other perſon having the return and execution of writs, ſuch priſoner or priſoners ſhall be at the time of ſuch declaration, by virtue of the proceſs of the ſaid court at the ſuit of the plaintiffs, which allegation ſhall be as good

and effectual, as if ſuch priſoner or priſoners were in the cuſtody of the marſhal of the *Marſhalſea*. Same ſtat. §. 3.

Upon this act the judges of the court of *King's Bench* made the following rule of court. *Paſch. 5 W. & M.* *Rule of court made* Paſch. 5 W. & M.

Firſt, That no copy of a declaration be delivered to any priſoner in cuſtody, before the day of the return of the proceſs upon which the defendant was taken or charged in cuſtody. *Declaration not to be delivered before return of proceſs.*

Secondly, That no rule be given for the defendant in cuſtody to appear, and plead to any declaration againſt him, until an affidavit be filed with the clerk of the rules of the delivering a copy of ſuch declaration, and of the time when, and the perſon to whom the ſaid copy was delivered, and that the defendant was arreſted or charged in cuſtody by proceſs out of this court returnable before the delivery of ſuch copy; and that the time of filing the affidavit be entered upon the affidavit by the clerk of the rules; and that a copy of ſuch affidavit be produced to the prothonotory or ſecondary before the ſigning the judgment. *No rule to appear and plead till affidavit made and filed of delivering the declaration*, &c. *Copy of affidavit to be produced before ſigning judgment.*

Thirdly, If a copy of the declaration be delivered againſt ſuch defendant before *menſem Paſchæ* or *craſtinum animarum*, and affidavit be made thereof and filed, and the defendant doth not appear before the end of ten days after *Eaſter* and *Michaelmas* term reſpectively, judgment may be entered againſt him if rules have been given; but if he doth appear before the end of ten days after the term, he ſhall imparle until the next term, (un- *Declaration delivered before* menſem Paſch *or* craſt. animarum. *Defendant to appear in ten days after term, otherwiſe judgment. If he does appear, may imparle 'till next term,*

except in London *or* Middlesex, *and priſoner within* 40 *miles of* London, *then to plead two days before eſſoin-day of next term.*

(unleſs the action be in *London* or *Middleſex*) and the defendant be in priſon within forty miles of *London* or *Weſtminſter*, then, tho' he doth appear before the expiration of ten days after the end of the term, he ſhall plead two days before the eſſoin-day of the next term; and in default thereof (rules for pleading having been given) judgment may be entered againſt him as aforeſaid.

If declaration delivered after menſ. Paſ. *or* craſt. animar. *or in* Hilary *or* Trinity *term, if defendant appears two days before eſſoin-day of next term, he imparles to next term.*

Fourthly, If a copy of the declaration be delivered againſt ſuch defendant on or after *menſem Paſchæ* in *Eaſter* term, or *craſtinum animarum* in *Michaelmas* term, or in *Hilary* or *Trinity* term, and thereupon the plaintiff gives rules to appear and anſwer, then if the defendant appear two days before the eſſoin-day of the next term, he ſhall imparle until the ſaid next term; but if he doth not appear within that time, judgment ſhall be given againſt him.

If declaration delivered before eſſoin day of the next term after the return of the writ, plaintiff may give rules the next term, and defendant muſt appear and plead before expiration thereof.

Fifthly, If a writ be returnable in any term, and a copy of the declaration has been delivered before the eſſoin-day of the next term, the plaintiff in ſuch next term may give rules to appear and anſwer; and if the defendant does not appear and plead upon the expiration of the rules, judgment ſhall be given againſt him.

If declaration not filed before the end of the term next after the return of the writ, and affidavit, &c.

Sixthly, If the declaration be not filed before the end of the next term after the writ or proceſs, by which the priſoner was taken or charged in cuſtody, is returnable, and affidavit made and filed in manner as aforeſaid

before the end of twenty days next after ſuch term, the priſoner ſhall be diſcharged by common bail, ſigned by one of the juſtices of this court.

Defendant to be diſcharged on common bail.

Seventhly, If any gaoler or keeper of a priſon, having received a copy of a declaration againſt any priſoner in his cuſtody, ſhall ſuppreſs the ſame, and not deliver it forthwith unto ſuch priſoner, an attachment ſhall be iſſued againſt him.

Attachment againſt gaoler concealing declaration.

Note; A bill or declaration in parchment ought to be filed in the office of the clerk of the declarations before a copy of it be delivered to the priſoner.

Bill to be filed before copy delivered.

For preventing the detainer of priſoners charged by declarations in the cuſtody of the marſhal of the *Marſhalſea* of this court, where the cauſe of action againſt ſuch priſoners does not amount to ten pounds, it is ordered, that from and after the laſt day of this term, no declaration, whereby any priſoner ſhall be charged in the cuſtody of the marſhal, ſhall be ſufficient cauſe of detaining ſuch priſoner in cuſtody, unleſs an affidavit that the plaintiff's cauſe of action againſt ſuch priſoner does amount to ten pounds or upwards, ſhall be firſt made, *and filed with the clerk of the rules of this court*; and the ſum ſpecified in ſuch affidavit ſhall be *indorſed by him* upon ſuch declaration before the leaving thereof with the turnkey. *Eaſter* 15 *Geo.* 2.

Declaration not a ſufficient cauſe of detaining a priſoner in cuſtody of the marſhal, unleſs affidavit be made that the plaintiff's cauſe of action amounts to ten pounds or upwards. 1 Str. 474.

Sum to be indorſed on the declaration.

I apprehend, that where a defendant in cuſtody for want of bail on meſne proceſs iſſuing either out of this court, or out of

An explanation of this rule offered.

the court of *Common Pleas*, is removed by *habeas corpus* into the cuſtody of the marſhal, the plaintiff in the firſt action when he comes to declare, need not make ſuch affidavit as by this rule is directed; for it will appear by the return of the *habeas corpus*, that an affidavit of the plaintiff's cauſe of action, amounting to ten pounds or upwards, was made on ſuing out the writ, whereupon the defendant was arreſted; and therefore this caſe not within the miſchief deſigned to be prevented by this rule; and I ſuppoſe the rule means only ſuch declarations as come in as new charges upon priſoners. *Sed quære.*

When priſoner in cuſtody of the marſhal is to plead.

When a bill is filed againſt a priſoner in cuſtody of the marſhal, if a copy of it be delivered for him to the turnkey four days excluſive before the end of the term, a rule to plead be given, and a plea demanded, which may be done on the back of the copy when delivered, the defendant ſhall plead as of that term; but if the bill be not filed, and the copy delivered four days excluſive before the end of the term, the defendant may imparle until the next term.

No affidavit of delivering copy of declaration.

No affidavit is required of the delivery of ſuch copy, as is where the defendant is in cuſtody of a ſheriff.

Plaintiff not declaring in two terms, defendant may be diſcharged on common bail without notice.

If any defendant ſhall be committed to the cuſtody of the marſhal of this court, or ſhall be charged in cuſtody of the marſhal, or arreſted, or committed by virtue of any proceſs of this court to the cuſtody of any ſheriff or other officer whatſoever, at the ſuit of any

any plaintiff, and ſhall ſo remain in cuſtody by two terms, and the plaintiff ſhall not declare againſt ſuch defendant within that time, ſuch defendant after the end of the ſecond term after ſuch impriſonment ſhall be diſcharged out of the priſon where he ſhall be ſo detained, upon filing common bail, ſigned by one of the juſtices of this court, without any notice to be given to the plaintiff or his attorney. *Trin.* 2 *Geo.* 1. The term in which the writ, whereon the defendant was arreſted, is returnable, altho' not returnable until the laſt day of the term, is to be accounted as one of the two terms, as is alſo the term wherein the defendant was committed to the cuſtody of the marſhal, altho' not committed 'till the laſt day of a vacation.

The term in which the proceſs is returnable to be accounted one of the terms.

To diſcharge a priſoner on this rule, you muſt obtain a certificate from the clerk of the declarations, that no bill is filed in his office againſt the defendant, and a certificate of the cauſes wherewith he ſtands charged, from the clerk of the papers of the *King's Bench* priſon, if in cuſtody of the marſhal, and from the gaoler or keeper of the priſon if in cuſtody of the ſheriff or other officer. And notice is required to be given to the plaintiff, and an affidavit muſt be made thereof, if the plaintiff or his attorney does not attend to oppoſe or conſent to his diſcharge.

How to diſcharge a priſoner for want of declaration.

If a plaintiff ſhall declare againſt a defendant remaining priſoner as aforeſaid, in the cuſtody of the marſhal of this court, or any ſheriff or other officer, and ſhall not proceed to trial, or obtain judgment within three terms next after the delivering ſuch declaration

Defendant to be diſcharged for want of proceeding to trial or judgment in three terms after declaration.

tion (the term in which the declaration ſhall be delivered being one) ſuch defendant ſhall be diſcharged out of cuſtody on filing common bail, notice being firſt given to the plaintiff or his attorney, and an affidavit thereof made, if the plaintiff or his attorney does not attend, and ſhew cauſe againſt the diſcharge. *Trin.* 2 *Geo.* 1.

May be diſcharged if not charged in execution in two terms after judgment. Carth. 469. 2 Str. 943, 1153, 1215.

If any plaintiff ſhall obtain judgment againſt any defendant priſoner, and ſhall not charge ſuch defendant ſo remaining in priſon in execution upon the judgment ſo obtained within two terms next after obtaining ſuch judgment, (the term wherein judgment ſhall be obtained to be reckoned as one) the defendant may obtain his diſcharge in like manner as for not proceeding to trial on judgment. See *Trin.* 2 *Geo.* 1.

What notice to plaintiff on diſcharging a priſoner.

In diſcharging a priſoner in either of theſe caſes, the notice to be given the plaintiff is a judge's ſummons to attend, * and ſhew cauſe why the defendant ſhould not be diſcharged for the plaintiff's not declaring, or not proceeding, as the caſe is.

How to diſcharge him out of the cuſtody of the marſhal.

If the priſoner be in cuſtody of the marſhal, he muſt get a certificate from the clerk of the common bails, that common bail was filed with him, by order of one of the judges, on which the marſhal will diſcharge him without a *ſuperſedeas*.

How out of the cuſtody of a ſheriff.

But if the priſoner be in cuſtody of a ſheriff or other officer, he muſt ſue a writ of *ſuperſedeas*, for ſigning which the bail-piece ſigned

* N. B. The firſt ſummons is peremptory.

ſigned by one of the judges is a warrant to the officer with whom you leave it, and he delivers it over to the clerk of the common bails to be filed.

Defendant after judgment ſurrendering in diſcharge of bail, to be charged in execution in two terms, except writ of error or injunction.

If a defendant ſurrenders himſelf after judgment in diſcharge of his bail, the plaintiff muſt charge him in execution in two terms following, (the term in which he ſurrenders being one) or he ſhall be diſcharged upon common bail, as if in cuſtody for want of bail upon an action, unleſs proceedings be ſtayed by writ of error or injunction.

Priſoner on criminal account not to be charged with civil action.

If a man be attainted, or in cuſtody, on any criminal proſecution, he is liable to civil ſuits; but by the rules of the court he ought not to be charged, without leave of the court, or of a judge at his chambers: the perſon of a man under an attainder is not abſolutely at the diſpoſal of the crown; it is ſo for the ends of public juſtice, and for no other purpoſe; the king may order execution to be done upon him according to law, notwithſtanding he may be charged in cuſtody at the ſuit of creditors; but 'till execution is done, his creditors have an intereſt in his perſon for ſecuring their debts. *Foſt. Cr. Law* 61, 62, 63.

Priſoner on meſne proceſs taken on eſcape warrant muſt be declared againſt in two terms.

If any defendant, being in the cuſtody of the marſhal of this court upon meſne proceſs, ſhall be taken and detained in the cuſtody of any ſheriff on an eſcape warrant for eſcaping out of the marſhal's cuſtody, the plaintiff in ſuch action ſhall declare againſt the defendant in cuſtody of ſuch ſheriff, before the end of the ſecond term after his being ſo taken,

otherwiſe the defendant may be diſcharged by *ſuperſedeas*. Trin 6 Annæ.

Notice of trial to a turnkey is good againſt a priſoner. *Str.* 248.

The right way to charge a priſoner in execution is to file a bill as of the preceding term, and deliver or leave a copy of the declaration, as of the preceding term, and make an affidavit of having delivered it to, or left it for the defendant being in cuſtody. 2 *Bur. Rep.* 1052.

B. R. *Declaration for an aſſault againſt a priſoner in cuſtody of the ſheriff of* Middleſex. Lilly's Ent. 436. Stat. 4 & 5 W. & M. c. 21. §. 3.

Middleſex, * *to wit.* EDward *Owen*, gentleman, complains of *Hugh Hughs*, gentleman, being in the cuſtody of the ſheriff of the county of *Middleſex*, by virtue of a precept of our lady the queen, called a bill of *Middleſex*, iſſued out of the court of our ſaid lady the queen, before the queen herſelf, at the ſuit of the ſaid *Edward* againſt the ſaid *Hugh*

* *B. M. E. J.* and *O. D. queruntur de* J. W. *clerico in cuſtodia* H. M. *armigeri, vicecomitis comitatus* Monmouth, *virtute brevis domini regis vocati* a latitat *e curia banci regis emanantis et eidem vicecomiti directi de placito quod reddat eis* 100 l. *&c.* Demurrer. Exception: It does not appear by this declaration that the defendant was in cuſtody at the ſuit of the plaintiffs. [*Vide antea, fol.* 382. *Stat.* 4 *&* 5 *W. & M. c.* 21. §. 3] Judgment for the plaintiffs. The court ſaid they would explain at whoſe ſuit the *latitat* was by the following words, *de placito quod reddat eis, i. e.* the plaintiffs, 100*l.* for if the *latitat* was, that the defendant *reddat* to the plaintiffs 100 *l.* it muſt be underſtood at their ſuit. *Eaſter* 10 *Geo.* 1. *B. R. Morris et al'* v. *Watkins*, 2 *R. Raym.* 1362. *Trin.* 3 *Geo.* 2. *B. R. Crew* and *Daniel.*

Hugh [*or thus*; iſſued out of this court here at the ſuit of the ſaid *Edward* againſt the ſaid *Hugh*] for that, that he the ſaid *Hugh* on the twenty-fourth day of *Auguſt* in the twelfth year of the reign of our ſovereign lady *Anne*, now queen of *Great Britain*, *&c.* with force and arms, *&c.* at *Hampſtead* in the county of *Middleſex*, made an aſſault upon the ſaid *Edward*, and then and there beat, wounded and evilly treated the ſaid *Edward*, ſo that his life was greatly deſpaired of, and then and there did other injuries to him againſt the peace of our ſaid lady the preſent queen, and to the damage of the ſaid *Edward* of one hundred pounds; and thereupon he brings ſuit, *&c.*

A. B. for the plaintiff.
Defendant in the cuſtody of the ſheriff of *Middleſex*.

Pledges of proſecuting { *John Doe*, and *Richard Roe*.

In the *Queen's Bench*.

Edward Owen, plaintiff,
and
Hugh Hughs, defendant.

Affidavit of the delivery of the declaration.

H. P. of the parish of, *&c.* gentleman, maketh oath, that he this deponent did deliver a copy of the declaration hereunto annexed to the turnkey of *Newgate* against the defendant *Hughs* in custody on the 24th day of *October* last past; and this deponent has since been informed by one of the keepers of the said prison, that he did the same day deliver the said declaration to the said defendant *Hughs*.

Proceedings on scire facias *against bail, and to revive judgment*, &c.

No scire facias *or action of debt against bail, until* ca. sa.

NO *scire facias*, or other action of debt on the recognizance, lies against the bail (except in error, and, as I apprehend, in outlawry; *sed quære*) until a *non est inventus* be returned upon a *capias ad satisfaciendum* against the principal, and the writ be filed. *Lutw.* 1273. (This sufficient though it be not filed, and it may be filed at any time afterwards. 1 *Lev.* 225.) The reason is, because the bail are not bound to render the principal 'till they know what execution the plaintiff will chuse, whether he will chuse to have his body; which he makes appear by suing out the *ca. sa.* for he might have sued an *elegit* or *fi. fa.*

Bail not bound to surrender before ca. sa.

If no ca. sa. *bail may plead it, and be discharged.*

If there be no *ca. sa.* sued out, returned and filed, the bail may plead it, and be discharged; but the court will not quash the *scire facias* on motion.

A *ca. ſa.* may be void as to the principal, and yet well enough to ground a *ſci. fa.* againſt the bail; as if a *ca. ſa.* be ſued out above a year after the judgment, without reviving the judgment by *ſcire facias*; for the bail are ſtrangers, and cannot take advantage of that error in a collateral action. 2 *R. Raym.* 1096. 6 *Mod.* 304. *Holt* 90.

Ca. ſa. *ſued out above a year after a judgment not revived, ſufficient to ground a ſci. fa. againſt the bail.*

Action of debt on a recognizance of the bail of *Woolaſton*; plea, that after the giving the ſaid judgment, and before the day of exhibiting the plaintiff's bill, no *ca. ſa.* againſt *Woolaſton* was proſecuted and returned, *&c.* Replication: A *ca. ſa.* ſued and returned. Rejoinder, that *Woolaſton*, ſued error on the judgment before the *ca. ſa.* was proſecuted, returned and filed. General demurrer; judgment for the plaintiff, *Paſch.* 3 *Annæ*, *B. R.* becauſe the rejoinder is a departure from the bar. *Cro. Car.* 76. This term *Woollaſton* moved to ſet aſide the *ca. ſa.* as irregular, becauſe it was ſued out returnable *die lunæ proximo poſt Octabas Sancti Martini*, which was the 22d of *November*, and that very day the writ of error ſued out by *Woollaſton* the 20th was allowed; after which the *ca. ſa.* was filed, but returned the ſame day; and adjudged this *ca. ſa.* was well ſued out to charge the bail; and the motion was denied, *May* 5. *Paſch.* 3 *Annæ*, *B. R. Parkins* v. *Wollaſton*. *Eaſter* 5 *Annæ*, *B. R. Parkins* v. *Wilſon*. 2 *R. Raym.* 1256. 1 *Salk.* 321. 6 *Mod.* 130, 139. Vide *Fitz-G.* 175. 2 *Str.* 867. *Barnard. K. B.* 334.

Ca. ſa. *returnable in the ſame day a writ of error was allowed good to charge the bail.*

Sci.

Error ſued on the principal judgment no bar to ſuing a ca. ſa. *to charge the bail. Sed vide* 2 Str. 1186, 867. *contra.*

Sci. fa. againſt bail. Plea, no *ca. ſa.* Replication, a writ of error was ſued, and therefore plaintiff could not ſue a *capias*, &c. Demurrer. Judgment for the defendant. *Powel* juſt. Error upon the principal judgment is no bar to hinder the ſuing a *capias* in order to charge the bail; and ſo it was adjudged in this court very lately. *Paſch.* 10 *W.* 3. *C. B. Ward* v. *Bendal*, 1 *R. Raym.* 342. Sed vide *Fitz-G.* 175.

Judgment with ſtay of execution, tho' ca. ſa, may be ſued out to warrant a teſtatum, *yet it may not to warrant a* ſci. fa. *againſt the bail.*

If a defendant gives judgment with ſtay of execution, until a future day, the plaintiff may notwithſtanding ſue forth a *ca. fa.* or *fi. fa.* directed to the ſheriff of the county where the action is laid, and returnable before that day, in order to make out a *teſtatum* againſt the defendant; but no ſuch *ca. ſa.* ſhall be ſued forth to warrant a *ſcire facias* againſt the bail, unleſs by ſpecial agreement, becauſe it is to the prejudice of a third perſon.

Ca. ſa. *to lie 4 days in the ſheriff's office.*

To have 8 days between teſte and return.

A *capias ad ſatisfaciendum* againſt the principal, in order to charge the bail, muſt lie four days excluſive in the ſheriff's office. *Salk.* 599. 2 *R. Raym.* 1177. There ought to be eight days between the teſte and return of the *capias ad ſatisfaciendum* againſt the principal. *Salk.* 602. *Prax. Utr. B.* 27. Which the court agreed on demurrer; but ſaid, that it was only an irregularity in the proceedings, and therefore the defendants ſhould have moved the court to have them ſet aſide for irregularity. *Holt*, chief juſt. But in point of law, proceſs in the court may be made returnable *de die in diem*, eſpecially proceſs

proceſs which goes into *Middleſex*. 2 R. Raym. 1177.

A *capias ad ſatisfaciendum* made returnable at a day which falls out of term, would not be void, (though liable to be ſet aſide on motion); nor can ſuch a defect in it be taken advantage of by bail, upon a general demurrer to a *ſcire facias* brought againſt them. 2 *Bur. Rep.* 1187, 1188.

Defendant dying before return of ca. ſa. *bail diſcharg'd.*

If the defendant dies after the *ca. ſa.* and before the return of it, the bail is diſcharged; *per Jones.* 1 *Jo.* 136. but they muſt plead it.

Recognizance forfeited on return of non eſt inventus *on* ca. ſa.

Upon a *non eſt inventus* returned upon the *ca. ſa.* the recognizance is forfeited, becauſe there was a default in the party; and though it is uſual to render the body upon the *ſcire facias*, yet that is of grace, not of neceſſity.

Principal dying after return of ſci. fa. *recognizance forfeited.*

The death of the principal at the time of the *ſcire facias* brought, is not material, if he was alive at the time of the *capias* returned. *Trin.* 5 *Jac.* 1. *B. R. Tymperly* v. *Coleman*, *Cro. Car.* 165. 1 *Rol. Abr.* 336. 1 *D. A.* 674. *p.* 1. *Hutt.* 47. *Mich.* 3 *Jac.* 1. *B. R. Williams* againſt *Vaughan*, *Cro. Jac.* 97. If after a *capias* returned, and before any *ſcire facias* brought, the defendant die, then the recognizance of bail is forfeited.

Aliter *if after* ca. ſa. *awarded, and before it be returned.*

But what if after the *capias* awarded, and before the return of it, the defendant die, whether in this caſe the recognizance of bail ſhall be forfeited? And it ſeems that it ſhall not, for he had time at any time to come to the court and render himſelf before the time of the return; therefore, if he die before that time, the bail is diſcharged. *Trin.* 2 *Car.* 1. *B. R.*

B. R. Calfe v. *Digney*, 1 *Jones* 139. Vide 1 *Danv. Abr.* 174. *p.* 1, 2. 2 *Danv. Abr.* 83. *p.* 6, 84. *p.* 7. A motion to ſtay proceedings againſt bail, becauſe the principal died after a *capias ad ſatisfaciendum* ſued out and returned, but before the return of the ſecond *ſcire facias* againſt the bail; but denied, becauſe it was the bail's omiſſion that they did not ſurrender him, he living 'till after the return of the *capias ad ſatisfaciendum*. The caſe of *Glyn* v. *Yates*, *Hil.* 7 *Geo.* 1. (1 *Mod. Ca.* 31.) cited 13 *Nov.* 1726. *Parry* v. *Berry*, 2 L. *Raym.* 1452. 2 *Str.* 717.

Principal alive when the ca. ſa. *returnable, but dies before it is actually returned, recognizance forfeited.*

Motion to ſtay proceedings againſt bail. *Ca. ſa.* againſt principal, returnable the laſt return of *Michaelmas* term, 28th *Nov.* The defendant died on the firſt day of *December*, the *ca. ſa.* being then in the ſheriff's office, and not actually returned and filed till the 3d of *December*. Motion denied 11 *Feb.* 1748. *B. R. Boyland* againſt *Crook* and others, bail of *Porter*.

Principal dying after ca. ſa. *returned, and before filed, court ſtayed the filing it.*

But where the principal has died after a *capias ad ſatisfaciendum* returned, and before it was filed, the court on motion ſtayed the filing of it in favour of the bail. *Mich.* 35 *Car.* 2. *B. R.* 1 *Lill. Abr.* 183.

How recognizance to be entered on the roll.

Before you make out a *ſcire facias* againſt the bail, ſee that the declaration be entered upon the rolls at *Weſtminſter* of the ſame term the declaration was of, with an *adhuc de termino*, *&c.* And after a declaration is entered *verbatim*, you enter this defendant's appearance, and the recognizance after it, thus:

And

And the ſaid *C. D.* by *R. R.* his attorney, comes and defends the force and injury, when, *&c.*

And thereupon *E. F. G. H.* (naming the bail with their additions) came into the court of our lord the king, before the king himſelf at *Weſtminſter*, in their proper perſons, and became pledges and manucaptors, and each of them became pledge and manucaptor for the ſaid defendant, that if it ſhould happen that the ſaid defendant ſhould be condemned in the plea aforeſaid, then the ſaid manucaptors granted, and each of them did grant, that as well the ſaid debt, as all ſuch * *damages* as ſhould be adjudged to the ſaid plaintiff in that behalf, ſhould be made of their and each of their lands and chattels, and to be levied to the uſe of the ſaid plaintiff, if it ſhould happen that the ſaid defendant ſhould not pay the ſaid debt and damages to the ſaid plaintiff, or render himſelf on that occaſion to the priſon of the marſhal of the *Marſhalſea* of our lord the king, before the king himſelf.

Entry of recognizance. Vide Lilly's Ent. 521. Salk. 564. Thompſon's Ent. 454, 456. Inſtr. Cl. 161. Inſtit. Leg. 92. 2 Vol. 442.

Condition of it.

On a recognizance in the court of *King's Bench*, the action or *ſcire facias* muſt always be brought in *Middleſex*. Salk. 564.

In what county ſci. fa. *againſt bail ſhould iſſue.*

On

* Where the demand is of a debt certain, one need ſay no more than *damna* to include coſts, except it be on taking a verdict on a trial, where coſts are to be mentioned; but upon confeſſion, *nil dicit*, *&c.* it is never, or at leaſt never need be done. *Per Holt* ch. j. *Paſ.* 1 *Ann. Atwood* and *Burr*, *Far.* 4.

3 Danv. 313, 314.

On a recognizance taken in the *King's Bench*, the *ſcire facias* muſt be brought in *Middleſex*; for the recognizances there are not obligatory by the caption, but by their being entered of record in the court; otherwiſe in the *Common Pleas*. Salk. 600, 659. Vide *Hob.* 195, 196. *Brownl.* 69. S. C. *Moor* 883. S. C. *Style's R.* 9.

On recognizance taken by commiſſioners. On recognizance on a writ of error.

If bail be taken by a commiſſioner in the country, the *ſcire facias* may be ſued out into *Middleſex*, or the county where taken. *Lutw.* 1287. But in caſe of a recognizance entered into by the bail, on a writ of error, if it be entered to be taken at a judge's chambers in *London*, the *ſcire facias* muſt be ſued into *London*.

How ſci. fa. *againſt bail on writ of error to be returnable.*

If a *ſcire facias* be brought againſt bail upon a recognizance on a writ of error generally, without expreſſing the action or the condition of the recognizance, there the *ſcire facias* muſt be returnable on a general return *ubicunque*; but if the action and the condition of the recognizance be ſet forth in the *ſcire facias*, and it appears to be by bill, then the *ſcire facias* muſt be returnable at a day certain in court. *Lilly's Practical Regiſter*, 2 vol. 499.

By original 15 *days between teſte and return of each* ſci. fa.

Every *ſcire facias* by original ought to have fifteen days incluſive between the teſte and the return, unleſs diſpenſed with by act of parliament.

Of the teſte and return of ſci. fa. *by bill.*

Firſt *ſci. fa.* teſte 24 Oct. returnable *lun. prox. poſt menſ. Mich.* (31 *Oct.*) *alias ſci. fa.* teſte 31 *Oct.* returnable *lun. prox. poſt craſt. animar.* (7 *Nov.*)

Obj.

Obj. That between the teſte of the firſt writ, and return of the laſt, there were not *fifteen days excluſive* of the days of the teſte and return.

Anſ. There are *eight days incluſive* between the teſte and return of each writ.

The ſecond writ muſt always bear teſte upon the ſame day on which the firſt was returnable, and therefore of neceſſity that day muſt be reckoned twice.

No objection can be made to the writs ſingly, therefore if each writ be good as it ſtands alone, the putting them together ſhall not make them irregular by a joint computation of the time. *Mich.* 10 *W.* 3. *B. R. Goodwin* v. *Beakbean*, *Carth.* 468. *Hil.* 9 *W.* 3. *B. R. Goodwin* and *Bearbank*. (And ſo it was reſolved *Mich.* 34 *Car.* 2. *B. R. Levingſton* and *Stoner*, 2 *Jones* 228. And in *Levingſton*'s caſe the court would not take notice by the almanack of the day of the month, in order to avoid the *ſcire facias.*) Comyns 53.

If the proceedings are by bill, fifteen days incluſive between the teſte of the firſt *ſcire facias* and the return of the laſt are ſufficient *Salk.* 599. 2 *Str.* 1139.

By bill 15 *days between teſte of firſt and return of laſt* ſci. fa.

Each *ſcire facias* ſhould have ſeven days between the teſte and return, and not the one ten or eleven, and the other four or five. Vide *Prax. Ut. B.* 27.

But in this caſe, by bill, if one *ſcire facias* only iſſue, and a *ſcire feci* be returned, the time between the teſte and return of the *ſcire facias* is not ſettled to any certain number of days, but muſt lie four days excluſive in the ſheriff's office before the return.

But if one ſci. fa *only iſſue, no time limited between teſte and return.*

Upon

No alias ſci. fa. *to iſſue forth until the firſt ſhall be returnable.*

Upon the iſſuing of any writ of *ſcire facias* upon any cauſe here in court, no writ of *alias ſcire facias* ſhall iſſue thereupon, until the firſt writ is returnable; and if any writ of *alias ſcire facias* ſhall iſſue to the contrary, then ſuch writ of *alias ſcire facias* ſhall be void. *Trin.* 8 *W.* 3. *Salk.* 599. 6 *Mod.* 86.

Alias ſci. fa. *to bear teſte the day of the return of the firſt, except.*

Every writ of *alias ſcire facias* ſhould bear teſte the day of the return of the firſt, *Salk.* 599. unleſs it be a *ſcire facias quare executionem non* on a writ of error; in which caſe it has been held not to be neceſſary.

The form of a ſcire facias *againſt bail.*

Sci. fa. *againſt bail by bill in debt.* Lilly's Entr. 387, 395, 657.

GEORGE the third, by the grace of God, of *Great Britain*, *France* and *Ireland* king, defender of the faith, *&c.* To the ſheriff of *Middleſex* greeting: Whereas *A. B.* * lately in our court, before us at *Weſtminſter*, by bill without our writ, and by the judgment of the ſame court, recovered againſt *C. D.* (add his addition and the *alias dict'* if any) one hundred pounds of debt, and alſo ſeven pounds ten ſhillings for his damages which

* *Scire facias* againſt bail, ſpecial demurrer, becauſe neither the term nor year of the judgment was ſhewn in the declaration. *Sed judicium pro quer.* becauſe it is the courſe of the *King's Bench* not to ſhew them. *Contra* of the *Common Pleas*. *Trin.* 1 *Ann. B. R. Pentrye* v. *Trippet*, 2 *R. Raym.* 789.

which he ſuſtained as well by occaſion of the detaining that debt, as for his coſts and charges by him about his ſuit in † that behalf expended, whereof the ſaid *C. D.* is convicted, as appeareth to us of record; and although judgment be thereupon given, yet execution of the ſaid debt and damages ſtill remaineth to be made to him: And whereas *E. F.* and *G. H.* [naming the bail with their additions] heretofore, to wit, in the term of St. *Michael* in the ſeventh year of our reign, came into our ſaid court before us at *Weſtminſter*, and became pledges and manucaptors, in their proper perſons, and each of them by himſelf became pledge and manucaptor for the ſaid *C. D.* That if it ſhould happen that the ſaid *C. D.* ſhould be convicted in the plea aforeſaid, then they the ſaid manucaptors granted, and each by them for himſelf did grant, that as well the ſaid debt, as all ſuch damages, coſts and charges as ſhould be adjudged to the ſaid *A. B.* in that behalf, ſhould be made of their and each of their lands and chattels, and be levied to the uſe of the ſaid *A. B.* if it ſhould happen that the ſaid *C. D.* ſhould not pay the ſaid debt and damages, coſts and charges to the ſaid *A. B.* or ſhould not render himſelf on that

† *Holt* ch. juſt. Where the *ſcire facias* is ſued againſt the defendant upon a judgment againſt himſelf, *in hac parte* is well enough; but *contra* if it be ſued upon a recognizance againſt the bail, there it muſt be *in ea parte*. Mich. 10 W. 3. B. R. Lug *v.* Goodwin. 1 R. Raym. 393. Salk. 599. Caſes B. R. 214.

occaſion to the priſon of the marſhal of our *Marſhalſea* before us: Nevertheleſs the ſaid *C. D.* hath not yet paid to the ſaid *A. B.* the ſaid debt and damages, coſts and charges, nor rendered himſelf on that occaſion to the priſon of the marſhal of our *Marſhalſea* before us, as we have been given to underſtand from the information of the ſaid *A. B.* in our ſaid court before us; whereupon the ſaid *A. B.* hath humbly intreated us, that he may have a proper remedy in this behalf; and we being willing that what is juſt ſhould be done on this occaſion, command you, that by good and lawful men of your bailiwic you make known to the ſaid *E. T.* and *G. H.* that they be before us at *Weſtminſter*, on next after to ſhew, if any thing they have or know to ſay for themſelves, why the ſaid *A. B.* ought not to have his execution againſt them for the debt and damages, coſts and charges aforeſaid, according to the force form and effect of the ſaid recognizance, if it ſhall ſeem expedient, *&c.* and further to do and receive all and ſingular thoſe things which our ſaid court before us ſhall then and there conſider of them in this behalf; and that you have there then the names of them by whom you ſhall make known to them, and this writ. Witneſs, *&c.*

Lee.

In caſe. If your judgment be in caſe on promiſe, the recital of it in the *ſcire facias* muſt be thus: "Recovered againſt *C. D.* one hun-"dred pounds for his damages which he ſu-"ſtained, as well by occaſion of the not per-"forming

" forming certain promiſſes and undertakings " lately made by the ſaid *C. D.* to the ſaid " *A. B.* as for his coſts and charges by him " about his ſuit in that behalf expended, " *&c.* And the reſt of the *ſcire facias* muſt be agreeable, by omitting the word *debt* throughout.

If in treſpaſs, ſay, " Recovered againſt " *C. D.* one hundred pounds for his damages " which he ſuſtained, as well by means of a " certain treſpaſs lately done by the ſaid *C. D.* to the ſaid *A. B.* as for his coſts, " *&c.* *In treſpaſs.*

Scire facias's by original are made out by the filacer of the county. Sci. fa. *by original made out by filacer.*

The *alias ſcire facias* differs from the firſt in nothing, except the teſte and return, and by adding after the words, *Command you*, theſe words, viz. *As we have heretofore commanded you.* Alias ſci. fa.

You make out a note or *præcipe* for the office, and pay the ſigner of the writs 1 *s.* 8 *d.* for ſigning this writ, and the ſealer 7 *d.* for ſealing it.

The firſt *ſcire facias* againſt bail may bear teſte the day of the return of the *ca. ſa.* 2 *R. Raym.* 1567. 2 *Str.* 866. And the ſecond *ſcire facias* ought to bear teſte the day of the return of the firſt. *How* ſci. fa. *ought to bear teſte.*

Every writ of *ſcire facias*, whereon a *nihil* is returned, ought to be delivered to the ſheriff, or left in his office ſometime before the return. *Eaſter* 5 *Geo.* 2. *Firſt* ſci. fa. *if* nihil, *to be left ſometime before the return.*

Second to be left 4 days exclusive before its return.

And every second, or *alias scire facias*, ought to be delivered to the sheriff, or left in his office four days exclusive before its return. *Same rule.*

Sci. fa. *if* sci. feci *returned, to be left 4 days exclusive before the return.*

And every *scire facias*, whereon the defendant is summoned, and a *scire feci* is returned, ought to be delivered to the sheriff, or left in his office, four days exclusive before the day of the return. *Same rule.*

No time fixed for warning defendant.

But no time is prescribed for warning the defendant before the return of the writ: If he is summoned the day before, or even on the day of the return, it is sufficient.

Time when sci. fa. *left to be indorsed by sheriff.*

The sheriff ought to indorse on every *scire facias* the day of the month and year on which it is delivered to him, or left in his office. *Easter* term 5 *Geo.* 2.

Rule to be given on a sci. feci *or two* nihils.

At the return of the second writ of *scire facias* (or of the first, if a *scire feci* be returned) you must give a rule with the clerk of the rules for the defendant, or bail, as the case is, to appear, and then award the *scire facias* on the roll.

Entry on the roll of two scire facias's *against bail, and judgment by default.*

Award on the roll of two scire facias's *against bail, and judgment by default.*

OUR lord the king sent to the sheriff of *Middlesex* his writ chose in these words, to wit, *GEORGE* the third, *&c.* (insert the whole writ *verbatim* to) Witness *William* lord *Mansfield*, at *Westminster*, the day of

of in the year of our reign: At which day the aforeſaid *A. B.* in his proper perſon came before our lord the king at *Weſtminſter*, and the ſheriff, to wit, (naming him) ſheriff of the ſaid county of at that day returned, that the ſaid *C. D.* and *E. F.* had not, nor had either of them, any thing in his bailiwic where or by which he could make known to them, or either of them; neither were they, nor was either of them, found in the ſame; and the ſaid *E. F.* and *G. H.* came not, nor did either of them come: Therefore, as before, it is commanded to the ſheriff, that by good, *&c.* he make known to the ſaid *E. F.* and *G. H.* that they be before our lord the king at *Weſtminſter*, on next after to ſhew in form aforeſaid, if, *&c.* and further, *&c.* The ſame day is given to the ſaid *A. B.* there, *&c.* At which day the aforeſaid *A. B.* came in his proper perſon before our lord the king at *Weſtminſter*; and the ſaid ſheriff returned, [*as before*] and the ſaid *E. F.* and *G. H.* altho' at that day ſolemnly demanded, came not, nor did either of them come, but made default. It is therefore conſidered, that the ſaid *A. B.* have his execution againſt the ſaid *E. F.* and *G. H.* of the debt and damages aforeſaid, [*as the caſe is*] according to the force, form and effect of the ſaid recognizance, *&c.*

Return nihil.

Second ſcire facias.

Nihil *returned.*

Judgment.

Where two writs of *ſcire facias* iſſue, returnable in different terms, the firſt muſt be entered of the term wherein it is returnable, and an award of the ſecond is ſufficient, without ſetting it forth at length.

How ſci. fa.'s *of different terms to be entered.*

How if bail appear. If the bail appear, you deliver a declaration on a double peny ſtanp, give a rule to plead, and demand a plea, as in other caſes.

The declaration is in this manner:

Michaelmas *term* [*as the term is*] *in the* 8*th year of king* George *the third.*

Declaration on ſci. fa. *Middleſex, to wit.* OUR lord the king ſent to the ſheriff of *Middleſex* his writ cloſe in theſe words, to wit, *GEORGE* the third, by the grace of God, [and ſo the whole entry, as before, *verbatim*, to the return incluſive of that writ to which the bail appear] And the ſaid *E. F.* and *G. H.* at that day having been ſolemnly demanded came by *R. R.* their attorney; upon which the ſaid *A. B.* prays that execution may be adjudged to him of the debt and damages aforeſaid, according to the form, force and effect of the ſaid recognizance, *&c.*

Proceedings to ſtay againſt bail 'till determination of writ of error upon the bail's undertaking, &c. After a writ of error is brought on the judgment in the original action, the court will ſtay the proceedings upon a *ſcire facias* againſt the bail, until the determination of the writ of error, upon the bail's undertaking to render the defendant to the cuſtody of the marſhal, or pay the money recovered, if the judgment be affirmed, within four days next after the affirmance thereof, and likewiſe undertaking to bring no bill in equity. *Myer*

and *Arthur*, *Paſch.* 8 *Geo.* 1. 1 *M. Caſes* 130.

The bail in the original action, upon a writ of error brought, are not liable to the coſts upon the affirmance of the judgment. *Bail in original action not liable to coſts in error.*

Formerly, where the plaintiff recovered a greater ſum than was laid in the action, the bail was not chargeable *in iſta actione.* 1 *Salk.* 102. But now where the plaintiff declares for, or recovers a greater ſum than is expreſſed in the proceſs on which he declares, the bail ſhall not be diſcharged, but be liable for ſo much as is ſworn to and indorſed on the ſaid proceſs, or for any leſſer ſum which the plaintiff in ſuch action ſhall recover. *Paſch.* 5 *Geo.* 2. *Bail liable though plaintiff recovers more than expreſſed in the proceſs.*

If an action be by original ſued out in *London*, and bail put in, and the declaration laid in another county, though it is good againſt the defendant, yet his bail are diſcharged, and not liable to a *ſcire facias.* 3 Lev. 235, 245. *Bail diſcharged by declaring in a wrong county.*

Bail may take up their principal even on a *Sunday*, and confine him 'till the next day, and then render him; for the entry is *traditur in ballium, &c.* and the doing it on a *Sunday* is no ſervice of proceſs, but rather like the caſe where a ſheriff arreſts by virtue of a proceſs of court on a *Saturday*, and the party eſcapes, he may take him on a *Sunday*, for that is only a continuance of the former impriſonment. 6 *Mod.* 231. *Bail may take their principal even on a* Sunday.

Though upon a *non eſt inventus* returned on the *capias ad ſatisfaciendum* againſt the principal, the bail's recognizance is forfeited in ſtrictneſs of law; yet if the defendant *What time to render him when a* ſci. fa. *brought.*

renders himself, or be surrendered by his bail, at any time before the return of the second *scire facias*, or of the first where a *scire feci* is returned, or on the very day of the return *sedente curia*, the court will *ex gratia* stay proceedings. *Vide* 3 *Cro.* 738. *Alyson* v. *Byston.* 3 *Cro.* 618. 3 *Bulst.* 182. *Moor* 850. *The Spanish Ambassador* v. *Gifford*, 2 *Cro.* 109. 1 *R. Raym.* 156. It was resolved, *Hil.* 8 & 9 *W.* 3. *B. R. Conyers* v. *Man* and *Rawlins*, where the bail pleaded in *scire facias* upon the recognizance, payment by the principal before the return of the second *scire facias* against the bail, that the plea was bad; for in strictness of law the recognizance was forfeited by suing out of the first *scire facias* against the bail. 1 *R. Raym.* 157.

Of staying proceedings against bail pending a writ of error.

Proceedings on a *scire facias* against the bail, brought pending a writ of error, were staid, on the bail's consenting, that if the judgment be affirmed they would surrender the principal, or give judgment on the *scire facias*. *Pas.* 7 *Geo. Myer* v. *Arthur. Trin.* 10 *Geo. Tucker* v. *Waller. Strange* 419. On a like motion, it appearing that bail was not put in upon the writ of error, so as to make it an absolute *supersedeas*, the court refused it, saying, they would not go one step further than the case of *Myer* v. *Arthur. Mich.* 1 *Geo.* 2. *Hunter* v. *Sampson*, 2 *Str.* 781.

Second *sci. fa.* against bail returned, and a rule given, on the fourth day a writ of error on the princial judgment was brought, and then a motion was made to stay the proceedings against the bail pending the writ

of

of error, and *Myer* v. *Arthur* cited; but denied, for the court ſaid it differed, for there the bail came in time, whilſt they might ſurrender the principal, which they cannot do here, after the return of the ſecond *ſcire facias*, at which time no writ of error was brought. *Trin.* 7 *Geo. Everet* v. *Gery*, *Strange* 443. *Curia:* Where the bail do not apply to ſtay the proceedings pending error, 'till their time to ſurrender is out, we will not give them any time for that purpoſe, but only four days to pay the money in, after the judgment is affirmed. *Trin.* 21 *Geo.* 2. *Richardſon* v. *Jelly*, 2 *Str.* 1270.

Action on recognizance of bail.

Upon a *non eſt inventus* returned on the *capias* againſt the principal, the plaintiff brought debt upon the recognizance, and the bail pleaded a render before the return of the *latitat*, i. e. a *latitat* actually ſued out and entered. *Et per cur.* Though this cannot be pleaded, yet the plaintiff ſhall not by this new courſe prevent the grace of the court. We will allow a render in this caſe on an action of debt as well as a *ſcire facias*, and that at any time before the return of the *latitat*, and perhaps may enlarge the time. 1 *Salk.* 101. Vide 2 *Show.* 79. *T. Raym.* 14. *Hil.* 13 *W.* 3. *B. R. Milner* v. *Petit.* Afterwards at the end of the term, *Holt* ch. juſt. ſaid, that the judges had made a rule, that if the plaintiff in the original action brings debt againſt the bail upon their recognizance, the bail ſhall have eight days after the return of the writ to render the principal; and if there are but four days in the term after the return of the writ, he ſhall have

have four days in the following term. 1 *R. Raym.* 721.

What time the bail, when an action brought againſt them on the recognizance, ſhall have to render the defendant's body in diſcharge of themſelves.

If any perſon or perſons being bail here in court for any defendant, in any action whatſoever, ſhall be impleaded by action of debt upon the recognizance, ſuch perſon or perſons ſhall have leave to render the defendant to the cuſtody of the marſhal of this court, in diſcharge of his bail, by the ſpace of eight intire days, in full term, next after the return of the writ of *latitat*, or other proceſs ſued out againſt ſuch bail, and upon notice thereof given to the plaintiff or his attorney, all further proceedings againſt the bail on the recognizance ſhall ceaſe. *Trin.* 1 *Annæ.*

Whereas by the rule of this court in actions of debt upon any recognizance of bail on meſne proceſs, the bail are allowed eight days in full term, after the return of the proceſs ſued out and ſerved upon any of them, to ſurrender the defendant in the original action for the diſcharging him or themſelves from ſuch recognizance: And whereas by the courſe of the court, the plaintiff ſuing out a writ in a plea of treſpaſs may declare in any action he thinks fit, which may be a ſurprize on ſuch bail: This court doth therefore order, that from and after the laſt day of this term in all ſuch writs or proceſs to be ſued out of this court upon any ſuch recognizance of bail, after the words *in a plea of treſpaſs*, there ſhall be inſerted the following clauſe; *And alſo to a bill of the ſaid plaintiff againſt the ſaid defendant in a plea of debt upon recogni-*

In writ upon recognizance of bail, ac etiam billæ *to be inſerted.*

zance

zance according to the cuſtom of our court before us to be exhibited, otherwiſe the defendant or his attorney ſhall not be bound to accept of a declaration in debt upon ſuch recognizance. *Eaſter* 15 *Geo.* 2. *Or defendant not bound to accept declaration on recognizance.*

Debt on a recognizance of bail, plea no *ca. ſa.* replication a *ca. ſa.* demurrer. But the court on motion being informed, that the defendants had ſurrendered the principal before the return of the *latitat*, ordered proceedings to be ſtayed, and an *exoneretur* to be entered upon the bail-piece, notwithſtanding the plea, replication and demurrer before the motion. *Hil.* 11 *W.* 3. *B. R. Dodſon* v. *King*, *Carth.* 516. *Principal ſurrendered before return of* latitat, *proceedings ſtayed after plea, replication and demurrer.*

Where any defendant in an action depending in court ſhall be rendered to the cuſtody of the marſhal in diſcharge of his bail, the attorney for ſuch defendant ſhall immediately give notice of ſuch ſurrender to the attorney for the plaintiff, and make oath thereof before the bail-piece ſhall be delivered to be filed, or be diſcharged; otherwiſe ſuch render ſhall be void. *Trin.* 1 *Annæ.* *Notice to be given the plaintiff's attorney of defendant's ſurrendering in diſcharge of his bail.*

But *Mich.* 3 *Annæ*, *per cur'*: If bail ſurrender the principal at or before the return of ſecond *ſcire facias*, it is good, tho' there be not immediate notice of it to the plaintiff, for the end of the notice in that caſe is twofold; one, that the plaintiff may, if he pleaſes, charge him in execution; the other, that he be at no further trouble or charge in proceeding againſt the bail; but if through want of notice he is at further charge againſt the bail, that ſhall not vitiate the ſurrender, but *The end of giving notice, and conſequence of omitting it.*

but yet the bail ſhall not be delivered 'till they pay ſuch charges. 6 *Mod.* 238.

How upon a perſon's rendering himſelf into cuſtody in diſcharge of his bail in court, or before a judge, the reddidit, *&c. is to be left.*

Where any perſon ſhall render himſelf in court, or before one of the judges of the court, in diſcharge of his bail, or ſhall be brought upon any writ of *habeas corpus* into court, or before one of the judges of the court, in order to be committed to the cuſtody of the marſhal of the court, [as he may be in diſcharge of his bail] the render-piece or writ of *habeas corpus*, with the return thereof, ſhall remain with the ſecondary of the court, or clerk of the judge before whom ſuch perſon ſhall be rendered or brought, to be filed; and a copy or note only of ſuch render or return of the writ of *habeas corpus*, under the hand of ſuch judge or the ſecondary, ſhall be delivered to the marſhal at the time of committing ſuch perſon to his cuſtody; and ſuch copy or note ſhall be made by the perſon ſo rendering himſelf, or proſecuting ſuch writ of *habeas corpus*, or by his attorney on this behalf. *Trin.* 3 *Annæ.*

Notice to the marſhal.

As to notice to the marſhal, ſee *Walton* againſt *Sutton*, *Salk.* 272.

Surrender after ca. ſa. *and defendant eſcapes, not a good ſurrender, becauſe it was an indulgence.*

As to rendering before a judge, *per cur'*: If at any time after the return of the *capias*, the bail ſurrender the principal at a judge's chamber, and he thereupon is committed to the tipſtaff, from whom he eſcapes or is reſcued, that will not be a good ſurrender, becauſe it is indulgence to the bail to ſurrender after a *capias* returned; *ſecus* if it be before a *capias* returned; for to ſurrender before or

at

at the return of the *capias* is matter of right. 6 *Mod.* 238.

It is uſual to make an entry of the render in the marſhal's book, kept in the *King's Bench* office. *Render to be entered in the marſhal's book.*

When the defendant is ſurrendered, get a certificate from the marſhal, and upon that the ſecondary diſcharges the bail-piece.

If notice of the render has been given, and an affidavit made thereof, and the bail-piece diſcharged by the ſecondary and filed, no *ſcire facias* or other proceſs ought to be ſued out againſt the bail. *After render no* ſci. fa. *againſt bail.*

But if the bail-piece be filed without being firſt diſcharged by the ſecondary, the bail does remain liable, although the defendant be actually in priſon. See *Williams* and *Williams*, *Salk.* 98. *Sed vide antea*, *fol.* 411, 412. *Carth.* 516. *If no* exonetur *entered, bail liable.*

The principal was in execution, and a *committitur* entered; and after a *ſci. fa.* was brought, and two *nihils* returned againſt the bail, and judgment upon the *ſci. fa.* and now they come and move to ſet it aſide; but the court would not, it being the act of the court, and the party ſhould have come and pleaded it upon the *ſci. fa.* Skinner 120. *Judgment by default on* ſci. fa. *againſt bail; though principal was in execution, no relief by motion; bail ſhould have pleaded it.*

Sci. fa. againſt the defendant as bail for *A. B. C.* and *D.* the defendant pleads, that before the return of ſecond *ſci. fa.* the plaintiff took *A.* in execution and ſtill detains him. Demurrer. Argued *pro. def.* that *quer.* having taken one of the principals in execution, had thereby diſabled the bail to render him, and therefore diſcharged him as to all the reſt. *Cur' contra:* The bail have undertaken *Where ſeveral defendants, tho' plaintiff takes one in execution, that don't diſcharge the bail as to the reſt.*

taken to bring in all four principals; and therefore though the plaintiff hath taken one, this does not discharge the bail as to the other three, for they ought, as they took upon them, to bring in all four. 2 *Lev.* 192. 1 *Vent.* 315.

Tho' sci. fa. against bail be joint, execution may be several;

and against the body.

Sci. fa. against *Fane* and *Barker*, bail of *Barrel*, judgment thereon, and a *ca. sa.* against *Fane* only taken out. *Per cur'*: Though the *sci. fa.* was joint, yet the execution may be several: And note, though the recognizance be to levey it *de terris & catallis*, yet execution by the body is good by the law and usage of this court. 1 *Lev.* 225. 1 *Sid.* 339. 2 *Keb.* 269, 274. 3 *D. A.* 307. *p.* 2, 4, 5, 6. 2 *Sid.* 12. 2 *Inst.* 395. 3 *D. A.* 325. *G. p.* 3. 339. *p.* 6.

A. B. *against the bail of* C. D.

Michaelmas *term in the* 8*th year of king* George *the third.*

Sci. fa. *against bail on a recognizance in case.* Carth. 403. Lilly's Ent. 395.

Middlesex, to wit. OUR lord the king sent to the sheriff of *Middlesex* his writ close in these words, to wit, *GEORGE* the third, by the grace of God, of *Great Britain*, *France* and *Ireland* king, defender of the faith, *&c.* To the sheriff of *Middlesex* greeting: Whereas *A. B.* * lately in our court before as at *Westminster*, by bill, without our writ,

* Vide *antea*, fol.

writ, and by the judgment of the ſame court, recovered againſt *C. D.* ſixty and ſix pounds for his damages which he ſuſtained, as well by means of the not performing certain promiſes and undertakings lately made by the ſaid *C. D.* to the ſaid *A. B.* as for his coſts and charges by him about his ſuit in that behalf expended, whereof the ſaid *C. D.* was convicted, as appears to us upon record; and now on the behalf of the ſaid *A. B.* in our ſaid court before us, we have been informed, that although judgment be thereupon given, yet execution of the ſaid damages ſtill remains to be made to him: And whereas alſo *E. F.* of, *&c. G. H.* of, *&c. I. K.* of, *&c. L. M.* of, *&c. N. O.* of, *&c. P. Q.* of, *&c. R. S.* of *&c.* and *T. U.* of, *&c.* heretofore, to wit, of the term of St. *Hilary* in the year of our reign, in our ſame court before us at *Weſtminſter* perſonally came, and became pledges, and each of them by himſelf became pledge for the ſaid *C. D.* that if it ſhould happen that the ſaid *C. D.* ſhould be condemned in the ſaid action, then they the ſaid *E. F. G. H. I. K. L. M. N. O. P. Q. R. S.* and *T. U.* granted, and each of them by himſelf granted, that all ſuch damages coſts and charges, as ſhould in that behalf be adjudged to the ſaid *A. B.* ſhould be made of their and each of their lands and chattels, and be levied to the uſe of the ſaid *A. B.* if it ſhould happen that the ſaid *C. D.* ſhould not pay the ſaid damages, coſts and charges to the ſaid *A. B.* or ſhould not render himſelf on that accaſion to the priſon of the marſhal of our *Marſhalſea* before us: Nevertheleſs the ſaid *C. D.* has not

not yet paid the ſaid damages, coſts and charges to the ſaid *A. B.* * nor ſurrendered himſelf on that occaſion to the priſon of the marſhal of our *Marſhalſea* before us, as on the information of the ſaid *A. B.* in our ſaid court before us we have been given to underſtand; whereupon the ſaid *A. B.* hath prayed us, that a proper remedy may be provided for him in this behalf; and we, being willing that that which is juſt ſhould be done in this caſe, command you, that by good and lawful men of your bailiwic, you make known to the ſaid *E. F. G. H. I. K. L. M. N. O. P. Q. R. S.* and *T. U.* that they be before us at *Weſtminſter*, on *Monday* next after the morrow of *All Souls*, to ſhew, if they have or know any thing to ſay for themſelves, why the ſaid *A. B.* ought not to have his execution againſt them the ſaid *E. F. G. H. I. K. L. M. N. O. P. Q. R. S.* and *T. U.* of the damages aforeſaid, according to the force form and effect of the ſaid recognizance, if it ſhall ſeem expedient, *&c.* and further to do and receive all and ſingular thoſe things which in our ſaid court before us ſhall then and

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* *Scire facias* againſt bail; in the aſſigning the breach it was ſaid, that *F.* (the original defendant) did not render himſelf *priſonæ mareſcalli Mareſcalciæ dicti nuper regis*, and not ſaid *coram ipſo dicto nuper rege*, as the recognizance was, which was objected; *ſed non allocatur*, for it was ſaid *ea occaſione*, and *per curiam*, that will ſupply the want of the words *coram ipſo dicto nuper rege*, if they were neceſſary. *Mich.* 1 *Annæ*, *B. R. Snow* v. *Manucaptores Firebraſs. Intr. Trin.* 1 *Annæ*, *ro.* 360. 2 *R. Raym.* 804. *Salk.* 439.

and there be conſidered of them in this behalf; and have there then the names of thoſe by whom you ſhall make known to them, and this writ. Witneſs *William* lord *Mansfield*, at *Weſtminſter*, the twenty-firſt day of *June* in the year of our reign. At which day, before our lord the king at *Weſtminſter*, the ſaid *A. B.* came in his proper perſon, and the ſheriff of *Middleſex*, to wit, and

ſheriff of the ſaid county of *Middleſex*, returned, that the ſaid *E. F. G. H. I. K. L. M. N. O. P. Q. R. S.* and *T. U.* had nothing nor had either of them any thing in his bailiwic, where or by which he could make known to them or either of them; neither were they, nor was either of them, found in the ſame, and they came not, nor did either of them come: Therefore, as before, it is commanded to the ſheriff, that by good and lawful men of his bailiwic he make known to the ſaid *E. F. G. H. I. K. L. M. N. O. P. Q. R. S.* and *T. U.* that they be before our lord the king at *Weſtminſter*, on *Monday* next after the morrow of *All Souls*, to ſhew in form aforeſaid, if, *&c.* and further, *&c.* The ſame day is given to the ſaid *A. B.* there, *&c.* At which day before our lord the king at *Weſtminſter* came as well the ſaid *A. B.* in his proper perſon, as the ſaid *R. S.* and *T. U.* in their proper perſons; and the ſheriff, as before, returned, that the ſaid *E. F. G. H. I. K. L. M. N. O. P. Q. R. S.* and *T. U.* had nothing, nor had either of them any thing in his bailiwic, where or by which he could

Return of the ſheriff, nihil.

Alias *awarded.*

Return of the ſheriff, nihil.

make known to them, or either of them; neither were they, nor was either of them, found in the same; and the said *E. F. G. H. I. K. L. M. N. O.* and *P. Q.* although at that day solemnly demanded, came not, nor did either of them come, but made default: upon which the said *A. B.* prayed that his execution against the said *E. F. G. H. I. K. L. M. N. O. P. Q. R. S.* and *T. U.* of the damages aforesaid, according to the force, form and effect of the said recognizance, might be adjudged to him, *&c.* And the said *R. S.* in his proper person comes, and says, that the said *A. B.* ought not to have his execution against him of the damages, costs and charges aforesaid, by pretence of the said recognizance; because he says, that after the said judgment against the said *C. D.* at the suit of the said *A. B.* was given in form aforesaid, and before the issuing forth of the said first writ of our said lord the king of *scire facias* against the said *R. S.* as bail of the said *C. D.* at the suit of the said *A. B.* no writ of *capias ad satisfaciendum* upon that judgment, by the said *A. B.* against the said *C. D.* was in due manner sued forth, returned and filed in the court of the said lord the king now here of record, which, according to the custom of that court from the time whereof the memory of man is not to the contrary, used and approved in the same, ought to have been done before any writ of *scire facias* against the said *R. S.* as bail, as aforesaid,

Six of the bail make default.

Plea by one of the bail no ca. sa.

ought to have iſſued forth *; and this he is ready to verify: Wherefore he prays judgment, whether the ſaid *A. B.* ought to have his execution againſt him the ſaid *R. S.* of the damages, coſts and charges aforeſaid, by pretence of the ſaid recognizance, *&c.* And the ſaid *T. U.* ſays, that the ſaid *A. B.* ought not to have execution againſt him of the damages aforeſaid; becauſe he ſays, that after the giving the ſaid judgment, and before the iſſuing the ſaid firſt writ of *ſcire facias*, to wit, in term in year of the reign of our lord the now king, the ſaid *A. B.* for the obtaining the damages aforeſaid, proſecuted out of the court here upon the ſaid judgment, a certain writ of our lord the king of *fieri facias*, directed to the ſheriff of the county of *Surry*, againſt the ſaid *C. D.* by which writ it was then commanded to the ſaid ſheriff, that of the goods and chattels of the ſaid *C. D.* he ſhould cauſe to be made the damages aforeſaid, and that he ſhould have that money here on next after then next following, to render to the ſaid *A. B.* for the damages aforeſaid; which ſaid writ afterwards and before the return thereof, to wit, on the day of in the year aforeſaid,

Another bail pleads a levy by fi. fa.

* *Sci. fa.* againſt bail. They pleaded no *capias ad ſatisfaciendum*, and concluded to the country. The plaintiff demurred, and the plea was held ill by all for that reaſon. *Mich.* 1 *Annæ*, *B. R. Snow v. Manucaptores Firebraſs. Intr. Trin.* 1 *Annæ*, *ro.* 360, 2 *R. Raym.* 804. 2 *Salk.* 439.

ſaid, at *Croydon* in the ſaid county of *Surrey*, was delivered to one (the ſaid then, and until, and after the return of the ſaid writ, being ſheriff of the ſaid county) by virtue of which ſaid writ, the ſaid ſheriff afterwards, and before the return thereof, to wit, on the day of in the year aforeſaid, at *Croydon* aforeſaid, had cauſed the ſaid damages to be made of the goods and chattels of the ſaid *C. D.* and this he is ready to verify: Wherefore he prays judgment, whether the ſaid *A. B.* ought to have his execution againſt him of the damages aforeſaid, *&c.*

Replication, a ca. ſa. ſued out.

And the ſaid *A. B.* as to the plea of the ſaid *R. S.* ſays, that he, by any thing by the ſaid *R. S.* above in pleading alledged, ought not to be barred or hindered from having his ſaid execution againſt him for the damages aforeſaid, by virtue of the ſaid recognizance; becauſe he ſays, that after the ſaid judgment againſt the ſaid *C. D.* at the ſuit of the ſaid *A. B.* was given in form aforeſaid, and before the iſſuing forth of the firſt writ of our ſaid lord the king of *ſcire facias* againſt the ſaid *R. S.* as bail of the ſaid *C. D.* at the ſuit of the ſaid *A. B.* to wit, on the day of in the year of the reign of our ſovereign lord the now king, *&c.* he the ſaid *A. B.* at *Weſtminſter* in the county of *Middleſex* obtained and ſued forth out of the court of our ſaid lord the king before the king himſelf, the ſaid court being then and there at *Weſtminſter* aforeſaid, a certain writ of our ſaid lord the king of *capias*

ad

ad ſatisfaciendum for the damages, coſts and charges aforeſaid, upon the ſaid judgment againſt the ſaid *C. D.* directed to the then ſheriffs of the city of *London*, by which writ our ſaid lord the king commanded the ſaid then ſheriffs, that they would take the ſaid *C. D.* if he ſhould be found in their bailiwic, and ſafely keep him, ſo that they might have his body before our ſaid lord the king at *Weſtminſter*, on next after then next following, to ſatisfy the ſaid *A. B.* for the ſaid ſixty and ſix pounds, for the damages, coſts and charges aforeſaid, upon the ſaid judgment againſt the ſaid *C. D.* At which day the ſaid *A. B.* being in his proper perſon in the court of our ſaid lord the king before the king himſelf, (the ſaid court being then and there at *Weſtminſter* aforeſaid) the ſaid ſheriffs of *London*, to wit, at that day returned to our ſaid lord the king, that the ſaid *C. D.* was not found in their bailiwic, as by the ſaid writ of *capias ad ſatisfaciendum*, and the return thereupon remaining filed on record in the ſaid court of our ſaid lord the king before the king himſelf at *Weſtminſter* aforeſaid, among the file of writs of *capias ad ſatisfaciendum* of the ſaid court, may more fully appear; and this he is ready to verify by that record, *&c.* and prays that the record of the ſaid writ, and the return thereupon, by the court of our ſaid lord the king now here may be ſeen and inſpected, *&c.*

Returned non eſt inventus.

Prout patet per record'.

Iſſue.

And the ſaid *A. B.* ſays, that he, by any thing by the ſaid *T. U.* above by pleading alledged, ought not to be barred or retarded from

To the other bail did not proſecute any fieri facias.

from his execution for the ſaid damages againſt the ſaid *T. U.* becauſe he ſays, that he the ſaid *A. B.* did not at any time hitherto, for the obtaining the ſaid damages, proſecute out of the court here upon the ſaid judgment any writ of our lord the king of *fieri facias*, directed to the ſheriff of the county of *Surrey* againſt the ſaid *C. D.* as the ſaid *T. U.* has above by pleading alledged: And he prays that this may be inquired of by the country; and the ſaid *T. U.* thereupon doth the ſame, *&c.* But becauſe the court of our ſaid lord the king now here is not yet adviſed about giving judgment, as well of and concerning the premiſſes againſt the aforeſaid *E. F. G. H. I. K. L. M. N. O.* and *P. Q.* for that they have made default, as of and concerning the premiſſes between the ſaid *A. B.* and the ſaid *R. S.* above pleaded, day is therefore given as well to the ſaid *A. B.* as the ſaid *R. S.* to come before our lord the king at *Weſtminſter*, until, next after to hear judgment thereon, for that the court of our ſaid lord the king now here, is not yet adviſed thereof; and as to the trying the iſſue above joined between the ſaid *A. B.* and the ſaid *T. U.* to be tried by the country, the ſheriff is commanded, that he cauſe to come before our lord the king at *Weſtminſter*, at the ſame day, twelve, *&c.* by whom, *&c.* and who neither, *&c.* to recognize, *&c.* becauſe as well, *&c.* The ſame day is given as well to the ſaid *A. B.* as to the ſaid *T. U.* there, *&c.* At which day, before our lord the king at *Weſtminſter*, came as well the ſaid *A. B.* in his proper perſon, as the ſaid *R. S.* and

Iſſue. Continuance as to the default, and firſt iſſue by curia adviſare vult.

As to the ſecond iſſue, venire *awarded.*

Parties appear.

and *T. U.* in their proper perſons; but becauſe the court of our ſaid lord the king now here is not yet adviſed about giving judgment, as well of and concerning the premiſſes againſt the aforeſaid *E. F. G. H. I. K. L. M. N. O.* and *P. Q.* for that they have made default, as of and concerning the premiſſes between the ſaid *A. B.* and the ſaid *R. S.* above pleaded, day is therefore given as well to the ſaid *A. B.* as to the ſaid *R. S.* to come before our lord the king at *Weſtminſter*, until next after to hear judgment thereon, for that the court of our ſaid lord the king now here is not yet adviſed thereof; and as to the trying the iſſue above joined between the ſaid *A. B.* and the ſaid *T. U.* to be tried by the country, the ſheriff returned the ſaid writ in all things ſerved and executed together with a panel of the names of the jurors, of whom none, *&c.* Therefore the ſheriff is commanded, that he diſtrain the ſaid jurors, by all their lands, *&c.* and that of the iſſues, *&c.* ſo that he may have their bodies before our lord the king at *Weſtminſter*, at the ſame day, or before the king's right truſty and well-beloved *William* lord *Mansfield* his chief juſtice aſſigned to hold pleas before the king himſelf, if he ſhall firſt come, on next after at *Weſtminſter* aforeſaid, in the great hall of *Pleas* there, according to the form of the ſtatute in ſuch caſe made and provided, for default of the jurors, becauſe none of them did appear; therefore let the ſheriff have the bodies, *&c.* The ſame day is given as well to the ſaid *A. B.* as to the ſaid *T. U.* there, *&c.*

Continuance as to the default, and firſt iſſue by curia adviſare vult.

Diſtringas *awarded on the ſecond iſſue.*

Plea, that defendant died before ca. sa. *issued. Replication, that he is living, bad.*

Sci. fa. on recognizance against the bail of *Davis*. Plea, that before the issuing forth of the first writ of *sci. fa.* and before the issuing forth of any *ca. sa.* against *Davis*, he died, *&c.* Replication, that *Davis* is living, *&c.* *Absque hoc*, that he died before the issuing forth of any *ca. sa.* Demurrer. Objection, that the plaintiff ought to have set forth the certain time when the *ca. sa.* issued, and that the sheriff returned *non est inventus*. The replication was adjudged ill. *Hil.* 2, 3 *Jac.* 2. *B. R. Fortune* v. *Manucaptores* of *Davis*, *Carth.* 4.

If execution not within a year and a day after judgment, a sci. fa. *must issue to revive the judgment.*

If execution be not taken out within a year and a day after judgment given, there must be a *sci. fa.* taken out to revive the judgment, and execution cannot be taken out before such a *sci. fa.* is sued forth, and judgment thereon obtained; and this is in order to prevent a surprize upon the defendant: but this rule does not hold, where the defendant himself hath affected the delay; so far from it that the defendant's rule, to shew cause why such an execution should not be set aside, was discharged even with costs. 2 *Bur. Rep.* 660.

If execution sued out and continued on the roll, no need of sci. fa.

If the plaintiff takes out execution within the year, and it is not served, yet he may continue the same upon the roll from term to term 'till served, and need not sue out any *sci. fa.*

If a cesset executio *for a year, plaintiff*

If a *cesset executio* were for a year after the judgment, yet the plaintiff within the next year after may take out execution without a

scire

ſcire facias. But I apprehend the *ceſſet executio* ſhould be entered on the roll.

may have execution after a year and day without ſci. fa.

So if the defendant brings a writ of error, and delays the plaintiff for a year, and then is nonſuited, he may take out an execution without a *ſcire facias.*

And in caſe of a writ of error. Carth. 236.

Execution being ſtayed by injunction out of *Chancery* for above a year, and the injunction being diſſolved, the plaintiff took out execution without a *ſcire facias. Sed per cur':* We cannot take notice of the *Chancery* injunction, and you might have taken out a writ of execution, and continued it by *vicecomes non miſit breve*; a *ſuperſedeas quia improvide* was awarded to the execution. *Salk.* 322.

But not in caſe of an injunction.

If a judgment be of ten years ſtanding or above, the plaintiff cannot ſue out a *ſcire facias* without motion in court; if under ten, but above ſeven years, he cannot have a *ſcire facias* without a motion at the ſide-bar. If after ſuch motion, and judgment revived by *ſcire facias*, the defendant dies before execution, the plaintiff muſt ſue a new *ſcire facias*, but may have it without motion, for the judgment was revived before; *per cur'.* Salk. 598.

If judgment 10 years, muſt move court for ſci. fa. *if above 7, muſt move the ſide-bar. If after judgment ſo revived, and before execution, defendant die, muſt revive again, but may without motion.*

On a judgment of *Hil.* 30, 31 *Car.* 2. and no *elegit* (or other execution) actually ſued out within the year and a day, the plaintiff without ſuing out a *ſci. fa.* in *Trin. vac.* 5 *W. & M.* took out an *elegit*, whereupon an inquiſition was had, and the plaintiff's lands delivered

Execution of the ſame term with the judgment awarded on the roll ſeveral years after the judgment, and

continued down and executed without a sci. fa.

livered in execution; the plaintiff entered on the roll of the judgment an award of an *elegit* of the same term with the judgment, with continuances by *vic' non misit breve* to the time of suing out the present *elegit*. On examining several antient practisers in court, it appearing that the practice had been agreeable to this for many years, the court considering the inconveniencies that might ensue by opening a gap to destroy many executions, and because the practice had prevailed so long, ordered the execution to stand. *Carth.* 283. Vide *Comb.* 232. 3 *Danv. Abr.* 33. 2 *Show.* 235.

Sci. fa. *to revive a judgment after a year and a day.*

GEORGE the third, by the grace of God, of *Great Britain*, *France*, and *Ireland* king, defender of the faith, &c. To the sheriff of *Middlesex* greeting: Whereas *A. B.* * lately in our court before us at *Westminster*, by bill, without our writ, and by the judgment of the same court, recovered against *C. D.* otherwise called *C. D.* of, &c. four hundred and seven pounds of debt, and also sixty-three shillings for his damages, which he sustained, as well by occasion of the detaining that debt, as for his costs and charges by him about his suit in that behalf expended, whereof the said *C. D.* is convicted, as appears to us of record; and now on the behalf of the said *A. B.* we have been informed in our court before us, that although judgment

* *Vide antea* 50.

ment be thereupon given, yet execution of the ſaid debt and damages ſtill remains to be made to him; whereupon the ſaid *A. B.* hath prayed us, that a proper remedy may be provided for him in this behalf; and we being willing that what is juſt ſhould be done on this behalf, command you, that by good and lawful men of your bailiwic you make known to the ſaid *C. D.* that he be before us at *Weſtminſter*, on next after to ſhew, if any thing he has or knows to ſay for himſelf, why the ſaid *A. B.* ought not to have his execution againſt him of the ſaid debt and damages, accordidg to the force, form and effect of the ſaid recovery, if it ſhall ſeem expedient, *&c.* and further to do and receive what our ſaid court before us ſhall then and there conſider of him in this behalf; and have you there then the names of them by whom you ſhall make known to him, and this writ. Witneſs, *&c.*

As before to, As appears to us of record; and now on the behalf of the ſaid *A. B.* in our court before us, we are informed that he has been ſatisfied for 100*l.* parcel of the ſaid debt and damages, and that although judgment for the ſaid debt and damages be given, yet execution for 310*l.* 3*s.* reſidue of the ſaid debt and damages, ſtill remains to be made to him: Whereupon the ſaid *A. B.* hath prayed to us that *(as before to)* why the ſaid *A. B.* ought not to have his execution againſt the ſaid *C. D.* for the ſaid 310*l.* 3*s.* reſidue of the ſaid debt and damages, according to the force, form and effect of, *&c.*

Where parcel is ſatisfied becauſe levied by a fi. fa.

The

Muſt be directed into the county where the original action was brought.

The *ſcire facias* ought to be directed into the county where the original action was brought, upon which the judgment to be revived by the *ſcire facias* was obtained; for it ſhall be intended, that the party againſt whom the judgment was obtained doth inhabit ſtill in the county.

If either of the parties die, execution cannot be ſued out till a ſci. fa. *and judgment upon it.*

Where either plaintiff or defendant, or one of the plaintiffs, or one of the defendants die, there cannot be any execution ſued out upon the judgment until a *ſcire facias* ſued out and judgment thereupon; becauſe there muſt be a new judgment upon the *ſcire facias* to warrant the execution; that being different from the old judgment. See *ſtat.* 8 & 9 *W.* 3. *c.* 10.

Michaelmas *term in the eighth year of king* George *the third.*

Entry of two ſci. fa. *and* nihils *returned, and judgment thereon, againſt an adminiſtratrix in caſe, on judgment againſt her inteſtate.*

Middleſex, to wit. OUR lord the king ſent to the ſheriff of *Middleſex* his writ cloſe in theſe words, to wit, *GEORGE* the third, by the grace of God, of *Great Britain*, *France* and *Ireland* king, defender of the faith, &c. To the ſheriff of *Middleſex* greeting: Whereas *A. B.* * lately in our court, before us at *Weſtminſter*, by bill, without our writ, and by the judgment of the ſame court, recovered

* *Vide antea* fol.

recovered againſt *C. D.* fifty pounds for his damages, which he ſuſtained as well by means of the not performing certain promiſes and undertakings by the ſaid *C. D.* made to the ſaid *A. B.* as for his coſts and charges by him about his ſuit in that behalf expended, whereof the ſaid *C. D.* was convicted, as appears to us of record; and now on the behalf of the ſaid *A. B.* in our court before us, we have been informed, that although judgment be thereupon given, yet execution of that judgment ſtill remains to be made to him; and that the ſaid *C. D.* is dead, and died inteſtate; and that adminiſtration of all and ſingular the goods and chattels, rights and credits, which were of the ſaid *C. D.* at the time of his death, was, after the death of the ſaid *C. D.* at *Weſtminſter* in your county, in due form of law committed to one *E. D.* widow and relict of the ſaid *C. D.* as on the information of the ſaid *A. B.* in our ſaid court before us, we have been alſo given to underſtand; whereupon the ſaid *A. B.* hath humbly intreated us, that a proper remedy may be provided for him in this behalf; and we being willing that that which is juſt ſhould be done on this occaſion, command you, that by good and lawful men of your bailiwic you make known to the ſaid *E. D.* that ſhe be before us at *Weſtminſter*, on next after to ſhew, if any thing ſhe has or knows to ſay for herſelf, why the ſaid *A. B.* ought not to have execution againſt her of the damages, coſts and charges aforeſaid, of the goods and chattels, which were of the ſaid *C. D.* at the time of his death in her hands to be adminiſtered,

if

if it ſhall ſeem expedient, *&c.* and further to do and receive what our ſaid court before us ſhall then and there conſider of her in this behalf; and have you there then the names of thoſe by whom you ſhall make known to her, and this writ. Witneſs *William* lord *Mansfield*, at *Weſtminſter*, the twenty-third day of *November* in the 8th year of our reign: At which day before our lord the king at *Weſtminſter*, the ſaid *A. B.* comes in his proper perſon; and the ſheriff of *Middleſex*, to wit, *Richard Peers*, eſq; and *William Naſh*, eſq; ſheriff of the ſaid county, returns, that the ſaid *E. D.* hath not any thing in his bailiwic, where or by which he could make known to her; neither is ſhe found in the ſame; and ſhe comes not: Therefore, as before, it is commanded to the ſheriff, that by good and lawful men of his bailiwic he make known to the ſaid *E. D.* that ſhe be before our lord the king at *Weſtminſter*, on next after ; to ſhew in form aforeſaid, if, *&c.* and further, *&c.* The ſame day is given to the ſaid *A. B.* there, *&c.* At which day before our lord the king at *Weſtminſter* comes the ſaid *A. B.* in his proper perſon; and the ſheriff, as before, returns, that the ſaid *E. D.* hath not any thing in his bailiwic, where or by which he could make known to her; neither is ſhe found in the ſame; and the ſaid *E. D.* altho' at that day ſolemnly demanded, comes not, but made default: Therefore it is conſidered, that the ſaid *A. B.* have his execution againſt the ſaid *E. D.* of the goods and chattels which were of the ſaid *C. D.* at the time of his death in the hands of the ſaid *E. D.*

Return nihil.

Alias ſci. fa. *awarded.*

Nihil *returned.*

Execution awarded de bonis teſtatoris.

E. D. to be administered, if she has so much in her hands, by the default of the said *E. D.* &c.

If it be against executors the *scire facias* runs thus:

GEORGE the third, &c. To the sheriff of greeting: Whereas *A. B.* lately in our court, (as before to) as it appears to us of record; and afterwards the said *C. D.* at in your county made his last will and testament in writing, and thereby appointed *E. F.* and *G. H.* executors thereof, and afterwards died there, the said *A. B.* being no ways satisfied of his damages, costs and charges aforesaid; and now on the behalf of the said *A. B.* in our court before us, we have been informed, that although the said judgment be given, yet execution of that judgment still remains to be made to him; whereupon the said *A. B.* hath humbly intreated us, &c. (as in the former, the judgment is the same.) Sci. fa. *against executors.*

Feme sole recovered a judgment, and married; *sci. fa.* by baron and feme, and judgment thereon *habere executionem*; the wife died, husband brought a *sci. fa.* to have execution in his own right; demurrer, and judgment *pro. quer.* in *C. B.* error brought; adjudged, that the award of execution is attached in the husband by the judgment on the first *sci. fa.* and shall survive to him. *Carth.* 416. *Where after wife's death the husband shall have a* sci. fa. *on a judgment recovered by the feme whilst sole.* Trin. 9 W. 3. B. R. Woodyer *v.* Gresham.

A matter cannot be pleaded in abatement to a *sci. fa.* which was pleadable in abatement *Cannot plead in abatement of* sci. fa.

what was pleadable to the original action.

ment to the original action, as alienee, or the like, for the defendant ſhall not diſable the plaintiff to have execution where he has admitted him able to have judgment. *Salk.* 2. 2 *R. Raym.* 853. 1 *Sid.* 182. *Cro. Eliz.* 588. *Goldſ.* 128. *Cro. Eliz.* 25. But may not the defendant plead outlawry to a *ſci. fa.* upon a judgment, if the plaintiff was outlawed after the plea in bar, or after judgment by default in the firſt action?

If plaintiff or defendant dies after interlocutory judgment, ſci. fa. may go to revive judgment, and ſhew cauſe why damages ſhould not be aſſeſſed.

Where plaintiff or defendant dies after interlocutory judgment, and before final judgment, the action ſhall not abate, but may be revived by *ſcire facias*, but not ſo as to impower the executor, *&c.* of a deceaſed plaintiff to carry on an action, which he as executor, *&c.* could not have originally brought, or to load the executor, *&c.* of a deceaſed defendant with an action that could not have been originally brought againſt ſuch executor, *&c.* See *ſtat.* 8 *&* 9 *W.* 3. *c.* 10.

Sci. fa. *for an adminiſtrator of a plaintiff*

**GEORGE* the third, by the grace of God, of *Great Britain*, *France* and *Ireland* king

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* Judgment againſt an executor by *nil dicit*, and inquiry awarded; the plaintiff dies; the adminiſtrator brings a *ſci. fa.* the defendant as to the aſſeſſing damages ſays nothing; but ſays, when aſſeſſed, the plaintiff ought not to recover them, for that a judgment was obtained againſt him upon a bond of the teſtator, and that he hath not aſſets *ultra*. The plea is naught, for the ſtatute never intended to give the defendant leave to plead in bar of the original action; 3 *Mod.* 142. *Salk.* 315. for the ſtatute intended only that a releaſe or other

king, defender of the faith, &c. To the ſheriffs of *London* greeting: Whereas *A. B.* heretofore in our court before us at *Weſtminſter*, by bill without our writ impleaded *C. D.* being in the cuſtody of the marſhal of our *Marſhalſea* before us, for that, to wit, that whereas [reciting the whole declaration] to the damage of the ſaid *A. B.* of 200 *l.* as he ſaid; and thereupon he brought ſuit, &c. And in ſuch manner were the proceedings in our ſaid court before us at *Weſtminſter*, that afterwards, to wit, in the term of the Holy *Trinity* laſt paſt, it was conſidered by our ſaid court before us, that the ſaid *A. B.* ought to recover againſt the ſaid *C. D.* his damages occaſioned by means of the premiſſes; but becauſe it was unknown to our ſaid court before us, what damages the ſaid *A. B.* had ſuſtained by means of the premiſſes; it was commanded to the then ſheriffs of *London*, that by the oath of twelve good and lawful men of their bailiwic, they ſhould diligently inquire what damages the ſaid *A. B.* had ſuſtained, as well by means of the premiſſes, as for his coſts and charges by him about his ſuit in that behalf expended; and that they ſhould ſend the inquiſition, which they ſhould thereupon take, to us at *Weſtminſter*, at a certain day now paſt, under their ſeals, and

dying after interlocutory judgment, and before inquiry executed.

Interlocutory judgment.

Inquiry awarded.

Ff the

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other matter happening *puis darrein continuance* might be pleaded, or judgment arreſted, and the executor cannot be hurt for want of pleading to the action; for the judgment is only *de bonis teſtatoris*, as if recovered againſt the teſtator himſelf.

the ſeals of them by whoſe oath they ſhould take that inquiſition, together with our writ thereupon directed to them, as by the record and proceeding thereupon now remaining in our ſaid court before us plainly appears, yet inquiſition of the ſaid damages ſtill remains to be made; and the ſaid *A. B.* after interlocutory judgment had been given in form aforeſaid, died inteſtate, to wit, at *London* aforeſaid, *&c.* after whoſe death, to wit, on the day of in the year of our lord at *London* aforeſaid, *&c.* adminiſtration of all and ſingular the goods and chattels, rights and credits which were of the ſaid *A. B.* at the time of his death, was by *John*, by Divine Providence, archbiſhop of * *Canterbury*, primate of all *England*, and metropolitan, to whom the granting the ſaid adminiſtration of right belonged, in due manner committed to one *E. B.* widow, late wife of the ſaid *A. B.* as on the information of the ſaid *E. B.* we have been given to underſtand; and becauſe we are willing that thoſe things, which have been rightly done and adjudged in our ſaid court before us, ſhould be duly executed, we command you, that by good and lawful men of your bailiwic, you make known to the ſaid *C. D.* that he be before us at

Death of plaintiff.

Adminiſtration committed.

* *Sci. fa.* on a judgment in *B. R.* the adminiſtrator produced adminiſtration by the archbiſhop of *York*; and becauſe the judgment was aſſets at *Weſtminſter* in the province of *Canterbury*, this adminiſtration in the province of *York* did not extend to it. *Paſ.* 1 *Ann. B. R. Carlile* and *Greenwood*, *Far.* 15.

at *Weſtminſter*, on next after to ſhew, if any thing he has or knows to ſay for himſelf, why the ſaid damages in the ſaid action ought not to be aſſeſſed and recovered by the ſaid *E. B.* according to the form and effect of a certain ſtatute in ſuch caſe lately made and provided, if it ſhall ſeem expedient, *&c.* and have there then the names of them by whom you ſhall make known to him, and this writ. Witneſs *William* lord *Mansfield*, at *Weſtminſter*, the twenty-third day of *November* in the 8th year of our reign.

Lee.

Sci. fa. *againſt an adminiſtrator of a defendant dying after interlocutory judgment.* 6 Mod. 142. Salk. 315, 42.

GEORGE the third, *&c.* To the ſheriff of *Middleſex* greeting: Whereas *A. B.* lately in our court before us at *Weſtminſter*, to wit, in *Michaelmas* term laſt paſt, by bill without our writ impleaded *C. D.* then being in the cuſtody of the marſhal of our *Marſhalſea* before us, for that, to wit, that whereas [recite the whole declaration] to the damage of the ſaid *A. B.* of forty pounds, as he ſaid; and thereupon he brought ſuit, *&c.* and in ſuch manner were the proceedings in our ſaid court before us at *Weſtminſter*, that the ſaid *A. B.* ought to recover his damages by occaſion of the not performing the ſeveral promiſes and undertakings aforeſaid; but becauſe it was unknown to our ſaid court before us what damages the ſaid *A. B.* had ſuſtained by occaſion of the premiſſes aforeſaid, we therefore commanded you, that by the oath of twelve good and lawful men of your baili-

Interlocutory judgment.

Inquiry awarded.

wic, you ſhould diligently inquire what damages the ſaid *A. B.* had ſuſtained, as well by occaſion of the not performing the ſeveral promiſes and undertakings aforeſaid, as for his coſts and charges by him about his ſuit in that behalf expended; and that you ſhould ſend the inquiſition which you ſhould thereupon make to us at *Weſtminſter*, on next after laſt paſt, under your ſeal, and the ſeals of them by whoſe oath you ſhould take that inquiſition, together with that writ; and the ſame day was given to the ſaid *A. B.* before us at *Weſtminſter* aforeſaid, as by the record and proceedings thereupon, remaining in our ſaid court before us at *Weſtminſter*, manifeſtly appears: And whereas before the ſaid next after the ſaid *C. D.* at *Weſtminſter* in your county died inteſtate, and the inquiſition of the damages aforeſaid ſtill remains to be made, and one *E. D.* widow and relict of the ſaid *C. D.* is adminiſtratrix of all and ſingular the goods and chattels which were the ſaid *C. D.*'s her late huſband deceaſed, as on the information of the ſaid *A. B.* we have been given to underſtand; and becauſe we would that thoſe things, which in our ſaid court before us have been rightly acted, ſhould be duly executed, we command you, that by good and lawful men of your bailiwic you make known to the ſaid *E. D.* that ſhe be before us at *Weſtminſter*, on next after to ſhew, if any thing ſhe has or knows to ſay for herſelf, why the ſaid damages in the ſaid action ought not to be aſſeſſed, and to be recovered by the ſaid *A. B.* according to the

Death of defendant.

the form and effect of the ſtatute in ſuch caſe made and provided, if it ſhall ſeem expedient, &c. and further to do and receive, &c.

At which day before our lord the king at *Weſtminſter* the ſaid *A. B.* came by *R. R.* his attorney, and the ſheriff of the county of *Middleſex*, to wit . . . and returned, that by *F. G.* and *J. K.* good and lawful men of his bailiwic, he had made known to the ſaid *E. D.* that ſhe ſhould be before our lord the king at the day and place contained in the ſaid writ, to ſhew, &c. according to the tenor of the ſaid writ; which ſaid *E. D.* ſo ſummoned at that day, being ſolemnly demanded, came by *A. S.* her attorney, upon which the ſaid *A. B.* prays that the ſaid damages in the ſaid action may be aſſeſſed, &c. *Return* nihil.

Caſe upon ſeveral promiſes; defendant demurs; judgment for the plaintiff, and a writ of inquiry awarded, and before any final judgment defendant dies, and the judgment revived according to the ſtatute.

Entry of a final judgment againſt the executor of a defendant dying before writ of inquiry.

At which day before our lord the king at *Weſtminſter*, came the parties aforeſaid, by their attornies aforeſaid; upon which all and ſingular the premiſſes being conſidered, and by the court of our lord the king here fully underſtood, and mature deliberation being thereupon had, it appears to the court of our lord the king here, that the ſaid declaration, and the matter therein contained, is good

Judgment for plaintiff on demurrer to declaration.

and ſufficient in the law, to hold and maintain the ſaid action of the ſaid *A. B.* againſt the ſaid *C. D.* Wherefore it is conſidered, that the ſaid *A. B.* ought to recover againſt the ſaid *C. D.* his damages which he has ſuſtained by occaſion of the premiſſes; and becauſe it is unknown to the court of our lord the king, before the king himſelf now here, what damages the ſaid *A. B.* has ſuſtained by occaſion of the premiſſes, it is therefore commanded to the ſheriffs of *London*, that by the oath of twelve good and lawful men of their bailiwic they diligently inquire what damages the ſaid *A. B.* has ſuſtained, as well by occaſion of the premiſſes, as for his coſts and charges by him about his ſuit in this behalf expended, and that the inquiſition, which they ſhould thereupon take, they ſhould make apparent to our lord the king at *Weſtminſter*, on next after under their ſeals, and the ſeals of them by whoſe oaths they ſhould take that inquiſition, together with the ſaid writ thereupon directed to them. A day is given to the ſaid *A. B.* there, *&c.* At which day before our lord the king at *Weſtminſter* came the ſaid *A. B.* by his attorney aforeſaid, and the ſheriffs did not return the ſaid writ, nor did they do any thing thereupon, and the ſaid *C. D.* did not come; and upon this the ſaid *A. B.* ſays, that the inquiſition of the ſaid damages ſtill remains to be made, and that the ſaid *C. D.* after the ſaid interlocutory judgment was given in form aforeſaid, and before any final judgment obtained in the ſaid action, and before this day,

Inquiry awarded.

Vic. non miſ. breve.

at *London* aforeſaid, in the pariſh and ward aforeſaid, made his laſt will and teſtament in writing, and by his ſaid laſt will conſtituted and appointed one *E. D.* his wife, executrix of his ſaid will, and the ſaid *C. D.* afterwards died there, after whoſe death, and before this day, the ſaid *E. D.* proved the ſaid teſtament in due form of law, and took upon her the burden and execution of the ſaid teſtament, to wit, at *London* aforeſaid, in the pariſh and ward aforeſaid; and becauſe this is not denied, but the ſaid allegation of the ſaid *A. B.* to the court of our ſaid lord the king now here appears to be true: Therefore the ſaid *A. B.* prays the writ of our lord the king of *ſcire facias* againſt the ſaid *E. D.* executrix of the ſaid teſtament, according to the form of the ſtatute in ſuch caſe made and provided, to be directed to the ſheriffs of *London* aforeſaid; and it is granted to him, *&c.* whereby it is commanded to the ſheriffs of *London*, that by good and lawful men of their bailiwic they make known to the ſaid *E. D.* that ſhe be before our lord the king at *Weſtminſter*, on next after to ſhew, if any thing ſhe has or knows to ſay for herſelf, why the ſaid damages in the ſaid action ought not to be aſſeſſed and recovered by the ſaid *A. B.* if it ſhall ſeem expedient, *&c.* At which day before our lord the king at *Weſtminſter* came as well the ſaid *A. B.* by his attorney aforeſaid, as the ſaid *E. D.* in her proper perſon; and the ſheriffs of *London*, to wit, *Richard Peers*, eſq; and *William Naſh*, eſq; return,

Defendant makes his will.

Death of defendant.

Executrix proves the will.

Scire facias *awarded.*

Executrix appears.

Scire feci. that by virtue of the ſaid writ to them directed, by and good and lawful men of their bailiwic, they had made known to the ſaid *E. D.* that ſhe ſhould be before our lord the king at the day and place in the ſaid writ contained, to ſhew as the ſaid writ demands and requires; and the

Nil dicit. ſaid *E. D.* ſays nothing, nor ſhews nor alledges any matter to arreſt final judgment in the ſaid action, or why the ſaid damages in the ſaid action ought not to be aſſeſſed and recovered

Inquiry awarded. by the ſaid *A. B.* Therefore at the prayer of the ſaid *A. B.* by the court of our lord the king now here, it is commanded to the ſheriffs of *London*, that according to the form of the ſtatute in ſuch caſe lately made and provided, by the oath of twelve good and lawful men of their bailiwic they diligently inquire what damages the ſaid *A. B.* has ſuſtained, as well by occaſion of the premiſſes, as for his coſts and charges by him about his ſuit in this behalf expended; and that they ſend the inquiſition, which, *&c.* to our lord the king at *Weſtminſter*, on next after under their ſeals, and the ſeals of, *&c.* together with the writ of our ſaid lord the king, now thereupon directed to them. The ſame day is given to the ſaid *A. B.* there,

Return. *&c.* At which day before our ſaid lord the king at *Weſtminſter* came the ſaid *A. B.* by his attorney aforeſaid; and the ſheriffs of *London* aforeſaid, to wit, and ſheriffs of *London* aforeſaid, by virtue of the ſaid writ to them thereupon directed, return a certain inquiſition taken before them at the *Guildhall* of the city of *London*,

don, ſituate in the pariſh of St. *Lawrence* in the *Old Jewry*, in the ward of *Cheap* in the ſaid city, on the day of in the year of the reign of our ſovereign lord *George* the third, now king of *Great Britain*, *&c.* by the oath of twelve, *&c.* by which it is found, that the ſaid *A. B.* hath ſuſtained damages by occaſion of the premiſſes, beſides his coſts and charges by him about his ſuit in this behalf expended, to 58 *l.* and for theſe coſts and charges to 1 *l.* 6 *s.* 8 *d.* It is therefore conſidered, that the ſaid *A. B.* recover againſt the ſaid *E. D.* his damages aforeſaid, by the ſaid inquiſition found, in form aforeſaid, as alſo 8 *l.* 13 *s.* 4 *d.* which by the court of our ſaid lord the king now here were adjudged to the ſaid *A. B.* by his aſſent, of increaſe, for his ſaid coſts and charges, which ſaid damages in the whole amount to 88 *l.* to be levied of the goods and chattels of the ſaid *C. D.* at the time of his death, in the hands of the ſaid *E. D.* to be adminiſtered, if ſhe has ſo much in her hands, *&c.*

Final judgment.

De bonis teſtatoris.

Where a judgment by default has been obtained in an action brought againſt an executor or adminiſtrator, (which is *de bonis* of the deceaſed only) the way formerly was, on *nulla bona* returned on a *fieri facias*, to iſſue out a writ to inquire whether the defendant had waſted any of the effects of the deceaſed, and upon a *devaſtavit* returned by inquiſition to proceed by *ſcire facias*, for the defendant to ſhew cauſe why the plaintiff ſhould not have judgment *de bonis propriis*; to which *ſcire facias*

Method to obtain judgment de bonis propriis againſt executor or adminiſtrator.

facias the defendant might appear and plead *plene administravit*. Now the *scire facias* inquiry and *scire facias* are made out as the speedier way in one writ; but it is not worth while to proceed this way for a small debt, the plaintiff being allowed no costs after the first judgment, unless the defendant appears and pleads to the *scire facias*.

The readier and cheaper method is to bring an action of debt on the judgment, suggesting a *devastavit*.

Venire, distringas and jurata, on trial upon a sci. fa.

In the *venire*, *distringas* and *jurata*, for a trial upon a *scire facias*, after the words, *Of a plea of debt or trespass, as the action is*, you add these words, *Whereupon a* scire facias, &c.

Ejectment.

The nature of an action in ejectment.

THIS is an action for a tenant for term of years, who is ousted of his possession, to recover his term and damages.

Now the common action for trying titles to land.

But it is now become the most usual action for trying titles to land, and supplies the place of many real actions.

The method of commencing the action.

And the method is to feign a lease and an ejector, and draw a declaration against the feigned ejector, and send a copy thereof to the tenant in possession, giving him notice to appear and defend his title, or else that the ejector will suffer judgment by default, and thereby the tenant will be turned out of possession.

And

And thereupon the tenant or the landlord may be admitted to defend the poſſeſſion or title, on entering into a rule of court to become defendant in the room of the caſual ejector, and to confeſs the leaſe, entry and ouſter at the trial, and inſiſt upon the title only.

Tenant or landlord may be admitted to defend on entering into common rule.

A landlord was made defendant, according to *ſtat.* 11 *Geo.* 2. *c.* 19. §. 13. on the tenant's non-appearance; and entered into the common rule; and thereupon, a ſtay of execution againſt the caſual ejector was ordered, until this court ſhould make further order. 2 *Bur. Rep.* 756.

Of what things it will or will not lie, and of the certainty and incertainty of deſcribing them.

An ejectment lies of a ſtable, as alſo of an orchard and of a college. *Noy* 37. *Cro. El.* 818, 854. 1 *Rol. Rep.* 55. *Cro. Jac.* 655. *Palm.* 337. *Hard.* 55, 57. *Cro. Car.* 558. *Style* 215. Of a garden. *Godb.* 6. 1 *Leo.* 58. It lies of a boilery of ſalt. 1 *Leo.* 114. It lies *pro ſtagno. Yelv.* 143. 1 *Inſt.* 5. *Regiſt.* 227. *et pro turgite.* 1 *Inſt.* 5. Of a coal-mine. *Cro. Jac.* 150. *Noy* 121. 1 *Rol. Rep.* 483. *Hard.* 57. *Carth.* 277. 4 *Mod.* 143. *Comb.* 201. 1 *Show. Rep.* 364. *Salk.* 255. For a beaſt-gate. *Andr.* 106. 2 *Str.* 1084. *Pro prima tonſura. Cro. Car.* 262. *Pro herbagio. Hard.* 303, 401. *Pro paſtura centum ovium. Daliſ.* 95. *Hard.* 58. For tithes. *Andr.* 107. *Cro. Car.* 301. 1 *Jones*

321.

321. 1 *Inſt.* 159. *Dyer* 116. *pl.* 71. *Pro rectoria. Latch* 62. *Pro capella*, by the name of a meſuage. 11 *R.* 25. *Style* 101. *Salk.* 256. Of a hop-yard. *Palm.* 337. Of a houſe. *Cro. Jac.* 654. *Palm.* 337. 3 *Lev.* 97. *Hard.* 76. Of a chamber in the ſecond ſtory of ſuch a houſe. 3 *Leon.* 210. *Noy* 109. *Hard.* 57. Of a cloſe called *D.* containing three acres of land. *Cro. Jac.* 435. *Palm.* 102. 4 *Mod.* 98. Of twenty acres of furze and heath. *Cro. Car.* 179. 1 *Mod.* 90. *Pro quatuor molendinis, pro decem acris Piſarum. Cro. Eliz.* 339. For common of paſture. 1 *Str.* 54. For mountains in *Ireland.* 1 *Str.* 71. *De parte Domus.* 1 *Str.* 695. For an alder carr in *Norfolk.* 2 *Str.* 1063. Not for a tenement. 2 *Str.* 834. *Barnard. K. B.* 155.

An ejectment lies not *de pannagio*, for *pannagium* is but the privilege of taking pannage. 1 *Lev.* 213. It lies not of a rent or common appendant. *Cro. Car.* 202. *Cro. Jac.* 146. 1 *Inſt.* 9. *a.* Nor *de quodam rivulo, &c. aquæ curſu. Yelv.* 143. 1 *Brownl.* 142. *Popb.* 167. ſed vide *Godb.* 157. Nor *de piſcaria* in ſuch a river. *Cro. Car.* 492. *Cro. Jac.* 146. Nor *de crofto. Style* 30. *Sed* vide 1 *Lev.* 58. Nor of a kitchen. *Noy* 109. Nor of a cloſe. *Godb.* 53. 11 *R.* 55. 1 *Rol. Rep.* 55. *Bridg.* 56. Sed vide *Cro. Eliz.* 235, 339. *Cro. Jac.* 654. *Owen* 18. Nor of arable nor paſture land without ſhewing how much of one, and how much of the other. *Bridg.* 56. *Hard.* 133. *Palm.* 102. 3 *Lev.* 97. *Salk.* 254. Nor *pro virgata terræ. Cro. Eliz.* 339.

Ejectment

Ejectment in *Ireland de caſtro, villa & terris in Kilbrough*, without expreſſing the number and certainty of acres, is insufficient, for upon ſuch a general demand no *habere facias poſſeſſionem* can be awarded and executed. *Yelv.* 118.

An ejectment lies not of the fourth part of a meadow, without ſhewing the number of acres the meadow contains. 1 *Lev.* 213.

Ejectment for five cloſes of land arable and paſture, called *Long Furlongs*, containing ten acres, held ill; the plaintiff ought to have ſet forth how many acres of arable land, and how many acres of paſture diſtinctly, ſo as the ſheriff might certainly know what to deliver upon the *habere facias poſſeſſionem*. Carth. 204. Cro. Car. 573, 471. Hard. 59. Salk. 254. 1 Show. 338. 4 Mod. 42, 97. Comb. 198.

Ejectment in *Durham de mineris carbonum*, not ſaying how many. *Judic. pro Q.* and affirmed in error; the plaintiff producing ſeveral precedents in *Durham*, and alledging all the entries there in ejectment for coal-mines were the ſame as in this caſe. *Carth.* 277. 4 *Mod.* 143. *Comb.* 201. 1 *Show.* 364. *Salk.* 255.

An ejectment *de uno meſuagio, ſive tenemento*, naught. *Cro. Eliz.* 186. 3 *Leon.* 228. *Poph.* 197, 203. *Noy* 86. *Cro. Jac.* 125. *Style* 364. 1 *Sid.* 295. *Cro. Eliz.* 116. *March* 96. 2 *Rol. Abr.* 80.

But an ejectment of a meſuage or tenement, called the *Black Swan*, was held to be good. 1 *Sid.* 295. 3 *Mod.* 238. 4 *Mod.* 136.

An ejectment for a meſuage or burgage is good. *Hard.* 173. Vide *Popb.* 203.

An ejectment for 100 acres of waſte, or *pro centum acris montis*, naught for incertainty. *Hard.* 57. *Palm.* 100. 1 *Rol. Rep.* 166. But for 100 acres of bogg in *Ireland*, good. *Cro. Car.* 512. *Palm.* 100. *Salk.* 255. 1 *Show.* 338.

Ejectment for a houſe, ten acres of land, and twenty acres of meadow, by the name of a houſe, and ten acres of meadow. Verdict *pro quer.* but judgment arreſted for repugnancy and incertainty. *Yelv.* 166. 4 *Mod.* 243.

Ejectment for a manor ſhould deſcribe the quantity and ſpecies of land contained therein. *Heil.* 146. *Lit. Rep.* 301. *Latch* 61.

Ejectment for ten acres of wood, and ten acres of underwood, good. 2 *Rol. Rep.* 482.

An ejectment *de omnibus & omnimodis decimis in decem acris in D.* without ſaying *garbarum, fani, lanæ agnellorum*, or giving any other deſcription of the nature and quality of the tithes, naught. 11 *Rep.* 25. *Moor* 837. *pl.* 1130. 1 *Rol. Rep.* 68. *Palm.* 101. *Andr.* 107.

An ejectment *pro quadam portione granorum & foeni* good. 11 *Rep.* 25. *Hard.* 57. *Dyer* 116.

An ejectment for a certain place called the veſtry in *D.* good. 3 *Lev.* 96.

The

The form of a declaration in ejectment.

Easter *term in the* 8*th year of king* George *the third.*

Middlesex, *John Den* complains of *Richard Fen*, being in the custody of the marshal of the *Marshalsea* of our lord the king before the king himself, for that, to wit, that whereas *E. W.* esq; on the tenth day of *May* in the third year of the reign of our sovereign lord *George* the third, now king of *Great Britain*, &c. at *Westminster* in the county of *Middlesex*, had demised and granted, and to farm let to the said *John Den* four messuages, (reciting the parcels) with the appurtenances, situate, lying and being in the parish of (the place where the premisses lie) in the county aforesaid; to have and to hold the said tenements, with the appurtenances aforesaid, to the said *A. B.* and his assigns, from the twenty-fifth day of *March* then last past, unto the full end and term of five years thence next ensuing, and fully to be complete and ended; by virtue of which said demise the said *John Den* entered into the said tenements, with the appurtenances, and was possessed thereof, until the said *Richard Fen* afterwards, to wit, on the said tenth day of *May* in the third year aforesaid, with force and arms, &c. entered on the tenements aforesaid, with the appurtenances, in and upon the possession of the said *John Den*, and ejected, drove out and amoved the said

John

John Den from his ſaid farm, his ſaid term not being yet ended, and kept out, and ſtill keeps out the ſaid *John Den* ſo ejected, drove out and amoved from his ſaid poſſeſſion, and then and there did other injuries to him, againſt the peace of our lord the now king, and to the damage of the ſaid *John Den* of ten pounds; and thereupon he brings ſuit, *&c.*

Robert Bicknell for the plaintiff,
for the defendant.
Pledges to proſecute, { *John Doe*, and *Richard Roe.*

Notice to be wrote under the declaration for the tenant in poſſeſſion.

Mr. ——

Notice to be wrote under declaration.

I am informed that you are in poſſeſſion, or claim title to the premiſſes in this declaration of ejectment mentioned, or to ſome part thereof, and I being ſued in this action as a caſual ejector, and having no claim or title to the ſaid premiſſes, do adviſe you to appear on the firſt day of next *Trinity* term in his majeſty's court of *King's Bench* at *Weſtminſter*, by ſome attorney of that court, and then and there by rule of the ſame court, to cauſe yourſelf to be made defendant in my ſtead; otherwiſe I ſhall ſuffer judgment to be entered againſt me, and you will be turned out of poſſeſſion.

Your friend,
22d *May* 1768. *Richard Fen.*

A true copy of this declaration and notice must be delivered perſonally to the tenant or to his wife, to whom at the time of the delivery the notice ſhould be read over, or an account given of the contents and meaning thereof.

To be delivered to tenant or wife, and notice to be read, &c.

A copy of the declaration, and notice left for the tenant with his ſon, daughter, or ſervant, he being abroad or out of the way, is not a good delivery, unleſs it evidently appear to the court, that ſuch declaration and notice came to his hands before the eſſoin-day of the term, and that on receipt thereof he very well underſtood the contents and meaning of the notice; and in ſuch caſe it has been held a good delivery. See *Salk.* 255. *pl.* 5.

Delivered to his ſon, daughter or ſervant, not good, unleſs proved to come to his hands, and he knew the meaning of it.

The delivery of the declaration on a *Sunday*, or after, or even upon the eſſoin-day that term wherein the defendant is to appear, is void.

Not good delivery on a Sunday, *&c.*

Upon affidavit that they had tendered a declaration in ejectment, and that the ſervants refuſed to call their maſter, or receive it, ſaying they had orders to take no papers; it was ordered that leaving it at the houſe ſhould be ſufficient. 1 *Str.* 575.

Rule that leaving the declaration at the houſe ſhall be good ſervice.

If the tenant do not appear and enter into the common rule, the plaintiff may, on affidavit of delivery of the declaration, move the court, that unleſs the tenant in poſſeſſion will enter into ſuch a rule, judgment may be entered againſt the caſual ejector.

If tenant does not appear, plaintiff may have rule for judgment.

If the tenant in poſſeſſion abſconds, the court will, upon ſervice of his niece, the

only manager of his houſe and reſident in it, and fixing up another copy on the premiſſes, make a rule to ſhew cauſe, why judgment ſhould not be entered up againſt the caſual ejector, and will further order, " that notice of ſuch rule to *any* perſon in the houſe be ſufficient, or if no perſon be in the houſe, then to be fixed on the door, *&c.* 2 *Bur. Rep.* 1116.

Tenant in poſſeſſion was perſonated at the time of ſervice by another, who accepted the ſervice in her name; this court made a rule to ſhew cauſe, " why it ſhould not be deemed good ſervice upon the tenant himſelf, and why judgment ſhould not be ſigned againſt the caſual ejector, in default of his appearing, and that leaving a copy of this rule at his houſe with ſome perſon there, or (if no one to be met with) affixing it on the door, ſhall be good ſervice of it", which rule was made abſolute on a proper affidavit: and this court will make a like rule (with a *retroſpect*) upon ſervice of a copy of the declaration on a ſervant in the houſe of an abſconding tenant in poſſeſſion, or of one who keeps out of the way to prevent being ſerved. 2 *Bur. Rep.* 1181, 1182.

Affidavit.

Affidavit of ſervice of declaration in ejectment.

G. H. of, *&c.* maketh oath, That he the deponent, on the day of laſt, delivered a true copy of the declaration, and notice hereunto annexed, to

tenant

tenant in poſſeſſion of the premiſſes in the ſaid declaration mentioned, and at the ſame time told him, that it was a declaration in ejectment, and that unleſs he did appear by ſome attorney of the court of *King's Bench*, the firſt day of this preſent *Michaelmas* term, there would be a judgment thereupon againſt the defendant by default, and he would be turned out of poſſeſſion, or words to that effect. Lilly's Ent. 203.

The affidavit muſt be poſitive that the tenant is tenant in poſſeſſion, for information or belief in this caſe will not do. *Affidavit muſt be poſitive that the tenant is tenant in poſſeſſion, and not on information.*

If the plaintiff does not move for judgment in the term wherein the tenant had notice to appear, the court will not grant a rule for judgment. See *Salk.* 257. *pl.* 9. *Plaintiff muſt move for judgment the ſame term tenant had notice to appear.*

Where the premiſſes ſued for lie in *London* or *Middleſex*, if the notice to the tenant at the bottom of the declaration be to appear the next term generally, without expreſſing any day in the term, the tenant in poſſeſſion has the whole term to appear in. *What time to appear where the premiſſes lie in* Lond. *or* Midd. *and notice is to appear of the next term generally.*

If the notice be to appear the firſt day of the term, or the beginning of the term, (the premiſſes lying in *London* or *Middleſex*) the tenant in poſſeſſion by the courſe of the court, has four days incluſive, next after the motion made for judgment, to appear and make his defence, if the motion be made early in *What time to appear when notice is for the firſt day, or beginning of the term.*

the term; otherwiſe the court will allow only one or two davs, and ſometimes will order the tenant to appear immediately, that the plaintiff may be able to give notice of trial within term.

But if the plaintiff does not move for judgment before the laſt four days of the term, the tenant will have until two days before the eſſoin-day of the ſubſequent term, to appear and make his defence.

What time when in any other county.

Where the lands lie in any other county than *London* or *Middleſex*, the tenant in poſſeſſion, although the declaration be delivered before the eſſoin-day of *Eaſter* or *Michaelmas* term, has four days after the end of the next iſſuable term to appear.

What time when in Cumberland, *or other county where judges go but once a year.*

And if the lands lie in *Cumberland*, or any other county where the judges go but once a year, the tenant in poſſeſſion may appear at any time within four days next after the end of the term preceding the aſſiſes to be held for ſuch county.

Method of appearing.

The method of appearing is, by the attorney for the defendant leaving the following rule ſigned by himſelf, at the chambers of one of the judges, and giving notice thereof to the plaintiff's attorney, who muſt alſo ſign the rule.

Saturday

Saturday *next after eight days of the purification of the Bleſſed Virgin* Mary, *in the 8th year of king* George *the third.*

Roe *on demiſes of* Northey, *eſq;* and Green *eſq;* Doe.

Rule for judgment againſt the caſual ejector.

UNleſs the tenant in poſſeſſion of the premiſſes in queſtion ſhall appear and plead to iſſue on *Thurſday* next after the end of the term, Let judgment be entered for the plaintiff againſt the now defendant *Doe*, by default; upon the motion of Mr. *Holt*.

Let the rule be entered.

By the court.

Friday *next after eight days of the purification of the Bleſſed Virgin* Mary, *in the 8th year of king* George *the third.*

Roe on *ſeveral demiſes of* Jolliffe, *knt. and* Green, *eſq;* Doe.

UNleſs *John Blaxland*, *Thomas Ranſom*, *John Simmons*, *William Gore*, *Thomas Gilbert* and *Stephen Ladd*, tenants in poſſeſſion of part of the premiſſes in queſtion, ſhall appear and plead to iſſue on *Tueſday* next after the end of the term, Let judgment be entered for the plaintiff againſt the now defendant *Doe* by default. But execution ſhall iſſue for ſuch

parts of the premiſſes only as are in their reſpective poſſeſſions; upon the motion of Mr. *Pigot*.

Let the rule be entered.

By the court.

Rule by conſent.

Michaelmas *term in the* 8*th year of king* George *the third.*

A. B. *againſt* C. D. *for* [*naming the parcels*] *in the county of*

on the demiſe of E. F.

IT is ordered by the conſent of the attornies of both parties, that *G. H.* be made defendant in the ſtead of the now defendant *C. D.* and do appear forthwith at the ſuit of the plaintiff, and file common bail, and receive a declaration in an action of treſpaſs, and ejectment for the premiſſes in queſtion, and forthwith plead thereto, Not guilty, and upon trial of the iſſue confeſs leaſe, entry and ouſter, and inſiſt upon the title only; otherwiſe let judgment be entered for the plaintiff againſt the now defendant *C. D.* by default; and if upon the trial of the iſſue, the ſaid *G. H.* ſhall not confeſs leaſe, entry and ouſter, whereby the plaintiff ſhall not be able further to proſecute his bill againſt the ſaid *G. H.* then no coſts ſhall be allowed for not further proſecuting the ſame; but the ſaid *G. H.* ſhall pay coſts to the plaintiff in that caſe to be taxed: And it is further ordered, that if upon the trial of the ſaid iſſue, a verdict ſhall be given for the ſaid *G. H.* or it ſhall happen that the plaintiff ſhall not further proſecute his ſaid bill for any other cauſe than for not confeſſing leaſe, entry and ouſter, then the leſſor

leſſor of the plaintiff ſhall pay to the ſaid *G. H.* his coſts in that behalf to be adjudged.

R. B. for the plaintiff.
A. S. for the defendant.

Rule thereon drawn up by the clerk of the rules.

This rule, or rather agreement for a rule, after ſigned by the plaintiff's attorney, and by the judge, at whoſe chamber it was left, muſt be carried to the clerk of the rules, who draws up the rule of court from it, of which each attorney ſhould beſpeak and take a copy.

Defendant's attorney to file common bail, and receive declaration, and plead Not guilty.

Then the attorney for the defendant muſt file common bail on a *cepi corpus*, and on receiving a declaration with the new defendant's name in it, inſtead of the caſual ejector's, immediately plead the general iſſue, and then the proceeding to trial is as in other caſes. But it is uſual, after the rule is drawn up, to make up the iſſue with the new defendant's name inſtead of the caſual ejector's, and deliver it to the attorney, with a copy of the rule, without delivering a declaration.

But if tenant in poſſeſſion does not appear, judgment againſt caſual ejector.

If the tenant in poſſeſſion does not appear by the time he ought, and enter into this rule by conſent, you draw up the rule for judgment, may ſign judgment againſt the caſual ejector, and have a writ of poſſeſſion of the premiſſes.

Judgment by nil dicit againſt the caſual ejector, with an imparlance to the next term after the declaration.

And now at this day, to wit, next after (the firſt day of the next term) to which day the ſaid *C. D.* had leave to imparle to the ſaid bill, and then to anſwer, &c. before our lord the king at *Weſtminſter* came

came the ſaid *A. B.* by his attorney aforeſaid: And the ſaid *A. B.* prays that the ſaid *C. D.* may anſwer his ſaid declaration; and the ſaid *C. D.* although at the ſame day ſolemnly demanded, comes not, neither does he ſay any thing in bar or preclusion of the ſaid action of the ſaid *A. B.* whereby the ſaid *A. B.* remains thereof undefended againſt the ſaid *C. D.* &c. Therefore it is conſidered, that the ſaid *A. B.* recover againſt the ſaid *C. D.* his term yet to come of and in the ſaid tenements, with the appurtenances, and alſo his damages, by occaſion of the ſaid treſpaſs and ejectment; and upon this the ſaid *A. B.* freely here in court remits to the ſaid *C. D.* as well all ſuch damages, coſts and charges, as may be adjudged to the ſaid *A. B.* in this behalf, as all judgments and executions for the ſaid damages, coſts and charges: Therefore let the ſaid *C. D.* be diſcharged from the ſaid damages, coſts and charges; and the ſaid *A. B.* craves the writ of our lord the king, to be directed to the ſheriff of to cauſe him to have poſſeſſion of his ſaid term yet to come of and in the ſaid tenements, with the appurtenances; and it is granted to him, returnable before our lord the king at *Weſtminſter*, on next after The ſame day is given to the ſaid *A. B.* there, &c.

Remittit dampna.

Judgment of the ſame term with the declaration.

And the ſaid *C. D.* by *R. R.* his attorney, comes and defends the force and injury, when, &c. and ſays nothing in bar or preclusion of the ſaid action of the ſaid *A. B.* but made default,

fault, whereby the ſaid *A. B.* remains thereof undefended [*as before.*]

Where judgment is obtained againſt the caſual ejector, and a trial is not loſt, the court will, on payment of coſts, and entering into the common rule for confeſſing leaſe, entry and ouſter, ſet aſide ſuch judgment as in other actions, and not put the tenant to the charge and hazard of recovering back his poſſeſſion by another action.

Judgment againſt the caſual ejector ſet aſide on terms.

No perſon ſhall be admitted to be defendant in ejectment with the tenant in poſſeſſion, but he that hath been in poſſeſſion or receives the rents.

Who ſhall be admitted to join as defendant with the tenant.

The landlord may be joined a defendant with the tenant in poſſeſſion, if he requeſt it, but cannot be compelled to join; and though the landlord ſhould be a member of parliament, he muſt be joined, and cannot be compelled to waive his privilege. *Salk.* 256.

Landlord may be joined on requeſt, but not compelled to join.

Any perſon claiming title to the premiſſes in queſtion, may, with leave of the court, be made a defendant with the tenant in poſſeſſion; but the court never permits ſuch perſons to defend alone without the tenant. *

Any perſon claiming title may be made defendant with the tenant.

But

* I cannot here omit taking notice of a moſt uncommon endeavour to deprive a fellow ſubject of his right, eſpecially as the attempt was made by one of my profeſſion under colour of law, and the above act of parliament: A gentleman let one of the fraternity a ſett of chambers in the *Temple* for the remainder of an unexpired term, after the landlord found he could get neither rent nor poſſeſſion, having endeavoured to do it to no purpoſe, for upwards of a year after the expiration of the

Landlord impowered to make himself defendant, &c.

But great inconveniences having happened by tenants refuſing to appear to ſuch ejectments, or ſuffer their landlords to take on them the defence thereof; by *ſtat.* 11 *Geo.* 2. *c.* 19. the court may ſuffer the landlord to make himſelf defendant, by joining with the tenant, in caſe he ſhall appear; but if the tenant ſhall refuſe to appear, judgment ſhall be ſigned againſt the caſual ejector for want thereof: But if the landlord of any part of the land, &c. ſhall deſire to appear by himſelf, and conſent to enter into the like rule that the tenant, in caſe he had appeared, ought to have done, then the court ſhall permit ſuch landlord ſo to do, and order a ſtay of execution upon ſuch judgment againſt the caſual ejector, until they ſhall further order therein *.

And

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the term, he ſerved his tenant with a declaration in ejectment, when the tenant by virtue of the above act of parliament made one who was an utter ſtranger to his landlord, who never was in poſſeſſion of the chambers, and who never received any rent for them, enter into the common rule, as the landlord, to defend his title to the premiſſes in queſtion, and all this was declared to be agreeable to the ſaid act of parliament, and the rules of this court. However upon a true repreſentation of the whole matter to the court, it was pleaſed to order an attachment againſt the tenant unleſs cauſe, and ſeemed to think the rules of the court in regard to this caſe were defective, and that no perſon ought to be admitted to defend his title, unleſs he made an affidavit that he had ſome. I humbly hope my lord chief juſtice *Mansfield* will excuſe my preſuming to uſe an expreſſion I had the honour of hearing his lordſhip make upon a like occaſion,

And by the same statute, a tenant, to whom any declaration in ejectment shall be delivered, shall forthwith give notice thereof to his landlord, under penalty of forfeiting the value of three years improved or rack rent.

Penalty on tenant secreting declaration in ejectment.

Where a defendant shall enter into the common rule to confess lease, entry and ouster, for so much of the tenements mentioned in the declaration, as are in the possession of such defendant, or of his under-tenants, the attorney, of such defendant shall forthwith deliver to the attorney of the plaintiff a note in writing of the tenements so in the possession of such defendant, or of his under-tenants. *Trin.* 15 *Car.* 2.

Defendant to give a note of the premisses, where he doth not defend the whole.

If at the trial the defendant will not appear, and confess lease, entry and ouster; the course is to call the defendant, and his attorney, if he be within the rule, and then to call the plaintiff himself, and nonsuit him, and then upon the return of the *postea*, judgment will be given against the casual ejector; also the master will tax costs upon the rule for confessing lease, entry and ouster; and if these be demanded of the defendant, and not paid, the court upon affidavit will grant an attachment. *Salk.* 259.

Proceeding against the defendant, if he does not confess lease, entry and ouster at the trial.

And

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tion, *viz.* That endeavouring to make that law, which the legislature intended for the safety and security of the subject, his ruin and destruction, was *seething the kid in its mother's milk.*

Where ſeveral defendants, and ſome will not confeſs, and ſome will.

And where there are ſeveral defendants, and at the trial ſome of them will not appear, and confeſs leaſe, entry and ouſter, and they who do appear will not confeſs leaſe, entry and ouſter, for thoſe who do not appear, the plaintiff ſhall not be nonſuited, but they who do not appear ſhall be found not guilty, and the plaintiff ſhall proceed to trial againſt thoſe who appear, and may enter up judgment againſt the caſual ejector, and have execution thereon againſt the lands of thoſe who did not appear, notwithſtanding they were found not guilty upon the trial.

How if the not confeſſing is in reſpect to ſome variance.

But where the defendant's not confeſſing leaſe, entry and ouſter, is with reſpect to ſome variance, and the defendant on that account makes no defence, judgment ſhall not be entered againſt the caſual ejector, neither ſhall the plaintiff have any coſts; and yet this caſe is not provided for in the rule by conſent.

How to proceed where plaintiff nonſuited on the merits, or verdict for the defendant.

Where a verdict ſhall be given for the defendant, or the plaintiff ſhall be nonſuited for any other cauſe than for the defendant's not confeſſing leaſe, entry and ouſter, the defendant muſt proceed to tax his coſts on the *poſtea*, as in other actions, and ſue out a *capias ad ſatisfaciendum* againſt the plaintiff; and if upon ſhewing the ſaid writ under ſeal to the leſſor of the plaintiff, and ſerving him with a copy of the rule by conſent, to confeſs leaſe, entry and ouſter, the leſſor of the plaintiff does not pay the coſts, the court will grant an attachment againſt him.

The leſſor of the plaintiff, or the plaintiff,

Where there is a recovery in ejectment by verdict, an action may be brought to recover the meſne profits from the time of the defendant's

dant's entry laid in the declaration; and at the trial it is not neceſſary to prove any entry of the defendant, becauſe the defendant doth in the rule confeſs leaſe, entry and ouſter; and alſo an entry upon the plaintiff by the defendant is found by the verdict againſt him. And this action may be brought either by the plaintiff in the action, or by the leſſor* of the plaintiff, and where the plaintiff brings it, he need only at the trial to produce his *poſtea* of his recovery; but where the leſſor brings it, he muſt prove his title over again if it be inſiſted on by the other ſide, or elſe he will be nonſuited.

may bring an action for the meſne profits.

The plaintiff in ejectment is a meer nominal perſon, and truſtee for the leſſor; and if he releaſe the action, or if an action be brought for the mean profits, and he releaſe it, he may be committed for a contempt. *Salk.* 260.

Releaſe of plaintiff a contempt. 2 Str. 899.

If the demiſe be laid to be on a day after the end of the term of which the declaration againſt the caſual ejector is, it is well; as if for non-payment of rent at *Michaelmas* a declaration as of the laſt *Trinity* term on a demiſe in *October* following, be delivered before the eſſoin-day of *Michaelmas* term, if the tenant does not appear, he can take no exception to the proceedings, as not being a party; if he does appear, he muſt enter into the common rule to confeſs leaſe, entry and ouſter, and thereby

Demiſe may be on a day after the term of which declaration againſt caſual ejector is.

* Or in the name of the leſſee, for it is equally the action of the leſſor of the plaintiff. 2 *Bur. Rep.* 668.

thereby undertakes to receive a new declaration, which will then be of *Michaelmas* term, and conſequently ſubſequent to the day of the demiſe.

How declaration ought to be when an infant leſſor.

Where the leſſor of the plaintiff is an infant, the declaration ought to ſet forth a leaſe by deed, and alſo rendering ſome rent, though it be but five ſhillings, otherwiſe the leaſe will be void; whereas this leaſe ſo declared upon, and which muſt be confeſſed by the defendant in his rule of leaſe, entry and ouſter, is not void, but voidable; and altho' this is really but a fictitious leaſe, and only to try the title, yet it muſt be a good leaſe in law; if it is not, the action will not lie upon it. See 2 *Leon. caſe* 275. *fol.* 218. *Modern Caſes* 248.

On demiſe of an infant proceedings ſtayed till ſecurity for defendant's coſts.

If an ejectment be brought on the demiſe of an infant, the court will ſtay the proceedings 'till a ſufficient plaintiff be named, or ſome perſon undertake on behalf of the infant to pay ſuch coſts as ſhall be adjudged to the defendant. *Vide* 1 *Str.* 694. 2 *Str.* 932. 2 *Kel.* 65. *pl.* 2 *Barnard. K. B.* 140.

Proceedings were ſtayed 'till the leſſor of the plaintiff ſhould give ſecurity for the coſts, his reſidence being in *Ireland*, although this ejectment was brought under the direction of the court of *Chancery*, and 40*l.* ſecurity had been already given there. 2 *Bur. Rep.* 1177.

When leaſe ſealed on the premiſſes, there muſt be an affidavit of the whole proceeding.

Where the houſe is empty, the lands untenanted, and the proceedings are in the old way by ſealing a leaſe on the premiſſes; on the motion for judgment there muſt be an affidavit of the ſealing the leaſe, and the purport

port of it ought to be ſhortly ſet forth in the affidavit, and alſo in what manner the defendant got the poſſeſſion given to and taken from the leſſee, (who is always made plaintiff), how the declaration was delivered to the defendant, that the court may judge of the regularity of the proceedings.

A motion was made for judgment in ejectment upon a leaſe ſealed on the land, and denied; for *per cur'*, you muſt try it. *Comb.* 13.

By ſtat. 4 Geo. 2. *declaration may be fixed on the door of the houſe, &c.*

Where half a year's rent ſhall be in arrear, the landlord having a right to re-enter for non-payment, may ſerve a declaration in ejectment without a formal demand or re-entry, or affix ſuch declaration on the door of any demiſed meſuage, or notorious part of the land, which ſhall be deemed a legal ſervice; and on proof that half a year's rent was due before the declaration was ſerved, and no ſufficient diſtreſs on the premiſſes countervailing the arrears of the rent then due, the leſſor ſhall recover. *Stat.* 4 *Geo.* 2. *c.* 28.

Of purport of affidavit on motion for judgment.

But in moving for judgment in this caſe there muſt be an affidavit, that there was half a year's rent in arrear before declaration ſerved, that the leſſor of the plaintiff had a right to re-enter, that no ſufficient diſtreſs was to be found on the premiſſes countervailing the arrears of rent then due, that the premiſſes were untenanted, or that the defendant could not be legally ſerved with the declaration, (as the caſe is) and that a copy of the declaration was affixed on the moſt notorious, and what part of the premiſſes, or the court will not give a rule for judgment.

On payment of rent and costs before trial, proceedings to cease.

If the tenant (in this case) before trial will either tender to the plaintiff, or bring into court, the rent in arrear, together with costs, all further proceedings shall cease. *Stat.* 4 *Geo.* 2. *c.* 28.

In these cases same time allowed to appear as to tenant in possession.

In these cases the like time is allowed, for the late tenant or other persons claiming title to the premisses, to appear, as is allowed for the appearance of tenants in possession.

Method of getting possession where the tenant runs away a year's rent in arrear, and leaves the premisses untenanted.

Stat. 11 Geo. 2.

Landlords being often great sufferers by tenants running away in arrear, and refusing to deliver up possession, whereby the landlords have been put to the expence of recovering possession by ejectment; by *stat.* 11 *Geo.* 2. *c.* 19. If any tenant holding at a rack rent, or where rent reserved shall be three fourths of the yearly value, who shall be in arrear for one year's rent, shall desert the premisses, and leave the same, so as no sufficient distress can be had, two justices of the peace, (having no interest in the premisses) at the request of the landlord, may go and view the same, and affix on the most notorious part of the premisses, notice in writing, what day (at distance of fourteen days at least) they will return to take a second view thereof; and if on such second view the tenant, or some person on his behalf, shall not pay the rent in arrear, and there shall be no sufficient distress, the justices may put the landlord into possession, and the lease thereof to such tenant as to any demise shall be void.

A

A niſi prius *record in ejectment.*

Pleas before our lord the king at Weſtminſter, *of the term of St.* Michael *in the 8th year of the reign of our ſovereign lord* George *the third, by the grace of God, of* Great Britain, France *and* Ireland *king, defender of the faith, &c. and in the year of our lord* 1768.

Middleſex, to wit. BE it remembered, that on *Monday* next after three weeks from the day of St. *Michael* in this ſame term before our lord the king at *Weſtminſter*, *Peter Noble* comes by *Anthony Beckwith* his attorney, and now brings here into the court of our ſaid lord the king his certain bill againſt *William Thompſon*, being in the cuſtody of the marſhal of the *Marſhalſea* of our lord the king before the king himſelf, of a plea of treſpaſs and ejectment of farm; and there are pledges of proſecuting, to wit, *John Doe* and *Richard Roe*; which ſaid bill follows in theſe words: *Middleſex*, to wit, *Peter Noble* complains of *William Thompſon*, being in the cuſtody of the marſhal of the *Marſhalſea* of our lord the king before the king himſelf, for that, to wit, that whereas *Robert Williamſon*, gentleman, on the twenty-firſt day of *January* in the ſeventh year of the reign of our ſovereign lord *George* the third, now king of *Great Britain*, *&c.* at the pariſh of St. *James Clerkenwell* in the county of *Middleſex*, had demiſed, granted, and to farm let to the ſaid *Peter Noble* twenty me-

ſuages with the appurtenances, ſituate, lying and being in the pariſh of St. *James Clerkenwell* in the ſaid county of *Middleſex*; to have and to hold the ſaid meſuages with the appurtenances to the ſaid *Peter* and his aſſigns, from the twenty-fifth day of *December* then laſt paſt unto the full end and term of five years from thence next enſuing, and fully to be complete and ended; by virtue of which demiſe the ſaid *Peter* entered into the ſaid meſuages, with the appurtenances, and was poſſeſſed thereof until the ſaid *William* afterwards, to wit, on the ſaid twenty-firſt day of *January* in the ſeventh year aforeſaid, with force and arms, *&c.* entered on the meſuages aforeſaid, with the appurtenances, in and upon the poſſeſſion of the ſaid *Peter*, and ejected, drove out and amoved the ſaid *Peter* from his ſaid farm, his ſaid term not being yet expired, and thereupon kept out and ſtill keeps out from his ſaid poſſeſſion the ſaid *Peter* ſo ejected, drove out and amoved, and then and there did other injuries to the ſaid *Peter*, againſt the peace of the preſent king, and to the damage of the ſaid *Peter* of ten pounds; and therefore he brings, ſuit, *&c.*

Not guilty. And the ſaid *William*, by *Thomas Smith* his attorney, comes and defends the force, injury and damages, and whatever elſe he ought to defend, when and where the court will take the ſame into conſideration; and ſaith, that he is in nothing guilty of the treſpaſs and ejectment aforeſaid, as the ſaid *Peter* above complains againſt him; and of this he puts himſelf upon his country; and the ſaid *Peter*

Peter likewiſe: Therefore let a jury thereupon come before our lord the king at *Weſtminſter*, on *Tueſday* next after fifteen days of St. *Martin*; and who are in no wiſe of kin either to the ſaid *Peter* or to the ſaid *William*, to take cognizance upon their oaths of the whole truth of the premiſſes, becauſe as well the ſaid *William* as the ſaid *Peter* have put themſelves upon that jury. The ſame day is given to the parties aforeſaid at the ſame place. Venire.

Pleas before our lord the king at Weſtminſter, *of the term of* St. Michael *in the 8th year of the reign of our ſovereign lord* George *the third, by the grace of God, of* Great Britain, France *and* Ireland *king, defender of the faith,* &c. *and in the year of our lord* 1768.

Middleſex, *to wit.* THE jury between *Peter Noble*, plaintiff, by his attorney, and *William Thompſon*, defendant, of a plea of treſpaſs and ejectment of farm, is reſpited before our lord the king at *Weſtminſter* until *Tueſday* next after the octave of St. *Hilary*, unleſs the king's right truſty and well-beloved *William* lord *Mansfield* his majeſty's chief juſtice aſſigned to hold pleas before the king himſelf, ſhall firſt come on *Wedneſday* the twenty-ninth day of *November*, at *Weſtminſter-Hall* in the county of *Middleſex* aforeſaid, according to the form of the ſtatute in ſuch caſe made and provided, for default of the jurors, becauſe none of them did appear; therefore let the ſheriff have the bodies of Jurata.

the ſaid jurors to make the ſaid jury between the parties aforeſaid, of the plea aforeſaid accordingly. The ſame day is given to the parties aforeſaid, at the ſame place.

Proceeding in ejectment by original.

As many prefer the method of proceeding by original in this action, on account of the difficulty and expence the defendant may be at in obtaining and proceeding on a writ of error in parliament to reverſe the judgment; I ſhall give ſome few precedents in that way.

The rule by conſent is the ſame, only leave out theſe words, *and file common bail*, and inſtead of the word *bill*, ſay *writ*.

Eaſter *term in the 8th year of king* George *the third.*

Iſſue in ejectment by original on a double demiſe. Salk. 774.

Berks, *to wit.* *Simon Winch*, late of *Bray* in the county aforeſaid, gent. was attached to anſwer *Thomas Barker*, gent. of a plea, wherefore with force and arms, into ſix meſuages, ſix cottages, ſixty acres of land, ſixty acres of meadow, three hundred acres of paſture, and forty acres of wood, with the appurtenances, in the pariſh of *Bray* in the ſaid county of *Berks*, which *William Yieldall* and *Rebecca* his wife had demiſed to the ſaid *Thomas* for a term which is not yet expired, and into ſix other meſuages, ſix other cottages, ſixty other acres of land, ſixty other acres of meadow, and three hundred other acres of paſture, and forty other acres of wood, with the appurtenances, in the ſaid pariſh of *Bray*, which *John Lidgold* the younger had demiſed to the ſaid *Thomas* for a term which is not yet

yet expired, he entered, and ejected him the ſaid *Thomas Barker* from his ſaid farms, and did other injuries to him, to the great damage of the ſaid *Thomas*, and againſt the peace of the preſent king, *&c.* and whereupon the ſaid *Thomas Barker*, by his attorney, complains, that *Firſt demiſe.* whereas the ſaid *William Yieldall* and *Rebecca* his wife, on the firſt day of *April* in the third year of the reign of our ſovereign lord *George* the third, now king of *Great Britain*, *&c.* at the ſaid pariſh of *Bray*, had granted to the ſaid *Thomas* the ſaid ſix meſuages, ſix cottages, ſixty acres of land, ſixty acres of meadow, three hundred acres of paſture, and forty acres of wood, with the appurtenances; to have and enjoy the ſaid tenements, with the appurtenances, to the ſaid *Thomas Barker* and his aſſigns, from the twenty-fifth day of *March* then laſt paſt, unto the full end and term of five years thence next enſuing fully to be complete and ended; by virtue of which ſaid demiſe, the ſaid *Thomas Barker* entered into the ſaid laſt mentioned tenements, with the appurtenances, and was thereof poſſeſſed: And alſo, that whereas the ſaid *John Lidgold*, on the ſaid *Second demiſe.* firſt day of *April* in the eighth year aforeſaid, at the ſaid pariſh of *Bray*, had demiſed to the ſaid *Thomas Barker* the ſaid ſix other meſuages, ſix other cottages, ſixty other acres of land, ſixty other acres of meadow, three hundred other acres of paſture, and forty other acres of wood, with the appurtenances; to have and enjoy thoſe tenements, with the appurtenances, to the ſaid *Thomas* and his

aſſigns, from the ſaid twenty-fifth day of *March* then laſt paſt, unto the full end and term of five years from thence next enſuing and fully to be complete and ended; by virtue of which demiſe the ſaid *Thomas* entered into the ſaid laſt mentioned tenements, with the appurtenances, and was thereof poſſeſſed, and being ſo thereof poſſeſſed, and alſo being poſſeſſed of the ſeveral tenements aforeſaid, with the appurtenances as aforeſaid, the ſaid *Simon Winch* afterwards, to wit, on the ſaid firſt day of *April* in the third year aforeſaid, with force and arms, *&c.* entered into the ſaid tenements, with the appurtenances, which the ſaid *William* and *Rebecca* his wife had in form aforeſaid demiſed to the ſaid *Thomas Barker* for the ſaid term firſt above mentioned, which is not yet expired; and into the ſaid tenements, with the appurtenances, which the ſaid *John Lidgold* had in form aforeſaid demiſed to the ſaid *Thomas Barker* for the ſaid term laſt above mentioned, which is not yet expired, and ejected him the ſaid *Thomas Barker* in form aforeſaid, and other injuries, *&c.* to the great damage, *&c.* and againſt the peace, *&c.* Whereupon he ſays that he is injured, and has damage to the value of one hundred pounds; and therefore he brings ſuit, *&c.*

Not guilty. And the ſaid *Simon Winch*, by his attorney, comes and defends the force and injury, when, *&c.* and ſays, that he is in nothing guilty of the treſpaſs and ejectment aforeſaid, as the ſaid *Thomas* above complains againſt him; and of this he puts himſelf upon the country; and the ſaid *Thomas*

mas likewiſe, *&c.* It is therefore commanded to the ſheriff, that he cauſe to come before our lord the king on the morrow of the aſcenſion of our Lord, whereſoever, *&c.* twelve, *&c.* by whom, *&c.* and who neither, *&c.* to recognize, *&c.* becauſe as well, *&c.* The ſame day is given to the parties aforeſaid, *&c.* *Iſſue.* Venire *awarded.*

Hilary *term in the eighth year of the reign of king* George *the third.*

Lancaſter. *John Wilding*, *Thomas Harriſon*, *&c.* were attached to anſwer *Thomas Neale*, wherefore with force and arms they entered into the moiety of the manor of *Bretherton*, otherwiſe *Brotherton*, with the appurtenances, and into thirty meſuages, ten cottages, four hundred acres of land, two hundred acres of meadow, and three hundred acres of paſture, with the appurtenances in *Bretherton*, otherwiſe *Brotherton*, and *Much Hoole* in the county of *Lancaſter* aforeſaid, which *James* duke of *Athol* demiſed to the ſaid *Thomas Neale* for a term of years which is not yet expired; and alſo into the moiety of another manor of *Bretherton*, otherwiſe *Brotherton*, with the appurtenances, and into other thirty meſuages, ten cottages, four hundred acres of land, two hundred acres of meadow, and three hundred acres of paſture, with the appurtenances in *Bretherton*, otherwiſe *Brotherton*, and *Much Hoole* in the county of *Lancaſter* aforeſaid, which the ſaid *James* duke of *Athol* alſo demiſed to the ſaid *Thomas* for a term of years which is not yet expired, and ejected him from his ſaid ſeveral farms, *Declaration in ejectment by original on a double demiſe.*

and other wrongs to him did, to the great damage of the said *Thomas Neale*, and against the peace of our sovereign lord the king; *And whereupon* the said *Thomas* by *John Howard* his attorney complains, that whereas the said duke on the twentieth day of *March* in the 7th year of the reign of the present king, at *Preston* in the county aforesaid had demised to the said *Thomas Neale* the said moiety and tenements aforesaid first above-mentioned, with the appurtenances; to have and to hold the same moiety and tenements, with the appurtenances, to the said *Thomas Neale* and his assigns, from the tenth day of the same *March* to the full end and term of twelve years from thence next ensuing, and fully to be complete and ended; by virtue of which demise the said *Thomas Neale* entered into the same moiety and tenements, with the appurtenances, and was possessed thereof; and the said *Thomas Neale* being so possessed thereof, the said *John Wilding*, *Thomas Harrison*, *&c.* afterwards, that is to say, on the said twentieth day of *March* in the said 6th year, with force and arms entered into the said moiety and tenements first above-mentioned, with the appurtenances, which the said duke demised to the said *Thomas Neale* in manner aforesaid, for the term of years aforesaid, which is not yet expired, and ejected the said *Thomas Neale* out of his said farm first above-mentioned, and other wrongs to him did, to the great damage of the said *Thomas Neale*, and against the peace of our sovereign lord the king; and also that whereas the said duke on the tenth day of *October*

in

in the eighth year of the reign of his ſaid majeſty, at *Preſton* aforeſaid, had demiſed to the ſaid *Thomas Neale* the moiety and tenements above ſecondly mentioned, with the appurtenances; to have and to hold the ſame moiety and tenements, with the appurtenances, to the ſaid *Thomas Neale* and his aſſigns, from the twenty-ninth day of *September* then laſt paſt to the full end and term of ſeven years from thence next enſuing, and fully to be complete and ended; by virtue of which ſaid laſt demiſe the ſaid *Thomas Neale* entered into the ſame moiety and tenements, with the appurtenances, and was poſſeſſed thereof: And the ſaid *Thomas Neale* being ſo poſſeſſed thereof, the ſaid *John Wilding*, *Thomas Harriſon*, *&c.* afterwards, that is to ſay, on the ſaid tenth day of *October* in the ſaid eighth year, with force and arms entered into the ſaid moiety and tenements laſt abovementioned, with the appurtenances, which the ſaid duke demiſed to the ſaid *Thomas Neale* in manner aforeſaid for the term of years aforeſaid, which is not yet expired, and ejected the ſaid *Thomas Neale* out of his ſaid laſt mentioned farm, and other wrongs, *&c.* to the great damage, *&c.* and againſt the peace, *&c.* Whereupon the ſaid *Thomas Neale* ſays he is injured, and hath damage to the value of forty pounds; and thereupon he brings this ſuit, *&c.*

And the aforeſaid *John Wilding*, *Thomas Harriſon*, *&c.* by *Robert Atkinſon* their attorney, come and defend the force and injury, when, *&c.* and ſay, that they are in no wiſe guilty of the treſpaſſes and ejectments afore- *Plea.*

ſaid

ſaid, as the ſaid *Thomas Neale* above complains againſt them; and of this they put themſelves upon the country; and the ſaid *Thomas Neale* likewiſe: Therefore it is commanded to the ſheriff, that he cauſe to come before the lord the king on the octave of the purification of the Bleſſed *Mary* whereſoever, *&c.* twelve, *&c.* by whom, *&c.* and who neither, *&c.* to recognize, *&c.* becauſe as well, *&c.*

Venire awarded.

Ejectment on a double demiſe, the laſt for tithes.

Dorſet, to wit. *A. B.* complains of *C. D.* being in the cuſtody of the marſhal of the *Marſhalſea* of our lord the king before the king himſelf, for this, to wit, That whereas *J. P.* gent. on the twenty-third day of *January* in the firſt year, *&c.* at *W.* in the county aforeſaid had demiſed, granted, and to farm let to the ſaid *A. B.* twenty acres of land, fifty acres of meadow, and fifty acres of paſture, with the appurtenances, in the pariſh of *W.* aforeſaid; to have and to hold the ſaid tenements, with the appurtenances, to the ſaid *A. B.* and his aſſigns, from the twenty-fifth day of *December* then laſt paſt, for and during the term of five years from thence next enſuing, and fully to be complete and ended; and alſo whereas *J. P.* eſq; father of the aforeſaid *J. P.* on the ſame twenty-third day of *January* in the firſt year aforeſaid, at *W.* aforeſaid, by * his indenture ſealed with

* Ejectment in *C. B.* for lands in *Suffolk* upon the demiſe of the corporation of *Bury*; after verdict *pro Q.* motion in arreſt of judgment, that it does not appear by the

with his ſeal, and to the court of our ſaid lord the king now here ſhewn, bearing date the ſame day and year, had demiſed and granted to the ſaid *A. B.* all the tithes of grain, corn, hay, lambs, *&c.* growing, coming, renewing and happening in two cloſes within the pariſh of *W.* aforeſaid, called *G.* containing by eſtimation forty-three acres; to have and to hold the ſaid tithes, with the appurtenances, to the ſaid *A. B.* and his aſſigns, from the ſaid twenty-fifth day of *December* then laſt paſt, for and during the term of five years from thence next enſuing fully to be complete and ended; by virtue of which ſaid ſeveral demiſes the ſaid *A. B.* afterwards, to wit, on the ſaid twentieth day of *January* in the firſt year aforeſaid, entered into the ſaid tenements and tithes, and was poſſeſſed thereof, until the ſaid *C. D.* afterwards, to wit, on the twenty-ninth day of *January* in the firſt year aforeſaid, at *W.* aforeſaid, with force and arms entered into the ſaid tenements and tithes of the ſaid *A. B.* and ejected, *&c.* [as before.]

Profert of the leaſe. Swadling *and* Piers, Cro. Jac. 613. Prieſt *and* Wood, Cro. Car. 301.

And

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the record that the leaſe was by deed. The prothonotaries certified, that the practice was, notwithſtanding the common rule of confeſſing leaſe, entry and ouſter, in ejectment for things incorporeal, as tithes, or upon demiſes of corporations, to lay the demiſe by deed. But held, that it was aided by the verdict. *Judic. pro Q.* affirmed in *B. R. Et per Holt* ch. juſt. the caſe of *Swadling* v. *Peers*, *Cro. Jac.* 613. is not law at this day. *Trin.* 8 & 9 *W.* 3. *B. R. Partridge* v. *Ball.* 1 *R. Raym.* 136. *Carth.* 390.

Judgment in ejectment by original, against the casual ejector by nil dicit.

And the ſaid *D.* by *R. R.* his attorney comes and defends the force and injury when, *&c.* and ſays nothing in bar or preclusion of the action of the ſaid *P.* but made default, by which the ſaid *P.* remains undefended upon that occaſion, againſt the ſaid *D.* for which it is conſidered, that the ſaid *P.* recover againſt the ſaid *D.* his term yet to come of and in the ſaid tenements, with the appurtenances; and upon this the ſaid *P.* freely here in court remits to the ſaid *D.* all ſuch damages, coſts and charges, as he the ſaid *P.* has ſuſtained by occaſion of the premiſſes, [*or* as can be adjudged to him in this behalf.] Therefore the ſaid *D.* is free from theſe damages, coſts and charges, *&c.* and upon this the ſaid *P.* prays the writ of our lord the king to be directed to the ſheriff of the county aforeſaid, to cauſe him to have poſſeſſion of his ſaid term yet to come of and in the ſaid tenements, with the appurtenances; and it is granted to him, returnable, *&c.*

Remittit damna.

Judgment by non informatus *in ejectment in original.*

And the ſaid *D.* by *R. R.* his attorney, comes and defends the force and injury, when, *&c.* and upon this the ſaid *P.* prays that the ſaid *D.* may anſwer his ſaid declaration, upon which the ſaid attorney of the ſaid *D.* ſays, that he is not informed by the ſaid *D.* of any anſwer to be given for the ſaid *D.* to the ſaid *P.* in the ſaid plaint, and he ſays not any thing elſe thereupon in bar or preclusion of the ſaid action of the ſaid *P.* by which the ſaid *P.* remains undefended, upon that occaſion, againſt the ſaid *D.* for which it is conſidered, that the ſaid *P.* re-

cover against the said *D.* the possession of his said term yet to come of and in the said tenements, with the appurtenances, and his damages by occasion of the said trespass and ejectment; but because it is unknown what damages the said *P.* has sustained by occasion of the said trespass and ejectment, it is commanded to the sheriff, that by the oath of twelve good and lawful men of his bailiwic, he diligently inquire what damages the said *P.* has sustained, as well by occasion of the said trespass and ejectment, as for his costs and charges by him about his suit in this behalf expended; and that the inquisition which *&c.* the sheriff do make appear to our lord the king from the day wheresoever, *&c.* under his seal, *&c.* and the seals, *&c.* The same day is given to the said *P.* *&c.* And upon this the said *P.* prays the writ of our lord the king, to be directed to the sheriff of the county aforesaid, to cause him to have possession of his said term yet to come of and in the said tenements, with the appurtenances; and it is granted to him, returnable, *&c.*

Inquiry of damages awarded.

GEORGE the third, *&c.* To the sheriff of *S.* greeting: Whereas *T. W.* late in our court before us at *Westminster*, by bill, without our writ, and by the judgment of the same court, recovered against *J. W.* his term yet to come of and in one messuage, one garden, *&c.* with the appurtenances, situate, lying and being in *P.* in your county, which *W. M.* on the first day of *October* in the eighth year of our reign demised to the said

Writ of possession.

ſaid *T.* for a term of years not yet expired, to wit, from the twenty-eighth day of *September* then laſt paſt, to the full end and term of five years thence next enſuing, and fully to be complete and ended; by virtue of which demiſe the ſame *T.* entered upon the ſame tenements with the appurtenances, and was thereof poſſeſſed, until the ſaid *J.* afterwards, to wit, on the ſame firſt day of *October* in the eighth year aforeſaid, with force and arms entered into the ſaid tenements, with the appurtenances, and him the ſaid *T.* from his farm aforeſaid, the ſaid term then and there not being expired, ejected, drove out and removed, and him the ſaid *T.* hath with-held from his poſſeſſion thereof, and ſtill doth with-hold, whereof the ſaid *J.* is convicted, as appears to us upon record: Therefore we command you, that without delay you cauſe the ſaid *T.* to have his poſſeſſion of his term aforeſaid yet to come of and in the tenements aforeſaid, with the appurtenances; and in what manner you ſhall have executed this our writ, make appear to us at *Weſtminſter* on, *&c.* And have there then this writ. Witneſs, *&c.*

Where the death of the plaintiff in ejectment ſhall not prevent judgment.

Motion in arreſt of judgment, on a ſpecial verdict in ejectment, for that the plaintiff was dead, denied *per cur'*. For that between the leſſor of the plaintiff and the defendant there was another cauſe tried at the ſame aſſiſes, and the verdict was not drawn up, but by agreement was to enſue the determination of this verdict, and the title to go accordingly. This ſubmiſſion was an implicit agree-

agreement not to take advantage of ſuch occurrences, as the death of the plaintiff in ejectment, whom we know to be no way concerned in intereſt, and often but an imaginary perſon. It was alſo ſaid to have judgment, that there lived in the county, where the lands are, a man of the ſame name with him that was made plaintiff. *Cur'*: This is ſufficient; and was there any of that name *in rerum naturâ*, we would intend he was the plaintiff. 1 *Mod.* 252.

Plaintiff in ejectment under the controul of the court, and cannot releaſe.

After recovery in ejectment, the leſſor brought an action for the meſne profits; the leſſee releaſed the action; the court ſet aſide the releaſe, ſaying the leſſee is in the nature of an officer of the court, and within the power and controul of the court. *Skin.* 247.

And liable to be puniſhed if he does releaſe.

The court takes notice judicially, that the leſſor of the plaintiff is the perſon intereſted, and therefore they puniſh the plaintiff if he releaſes the action, or releaſes the damages. 1 *Mod.* 252.

Of defendant's recovering his coſts, where the leſſor of the plaintiff was a peer, and beyond ſea.

Ejectment upon the demiſe of the duke of *Richmond*; verdict and coſts *pro def.* the plaintiff not being to be found, and the duke being a perſon privileged by parliament, and at this time an ambaſſador beyond ſea, ſo that no coſts could be had againſt him; the court ruled, that the duke's agents *Wrenham* and *Tilſon*, who gave the name of the plaintiff to *Hill* the duke's attorney, ſhould pay the coſts, or produce a plaintiff able to pay them, and committed them 'till they did ſo. 2 *Lev.* 66.

Levinz

Proceedings in ejectment ſtayed till coſts of a nonſuit in C. B. *on ſame title were paid* Salk. 255. *Vide* Andr. 297. 2 Str. 1099, 1105.

Levinz moved that a ſuit in ejectment in this court might be ſtayed 'till coſts upon a nonſuit in *C. B.* upon the ſame title were paid; the court adviſed upon it, and afterwards this term the chief juſtice ſaid it was propoſed to all the juſtices *at Serjeants Inn*; and they thought it reaſonable, as well where the ſuit was in another as in the ſame court, and that all the courts would be conformable in this matter. *Anonymus, Trin.* 30 *Car.* 2.

Leſſor of the plaintiff, who was but tenant for life, dies after verdict, and before judgment.

In ejectment, verdict *pro quer.* and before judgment entered, the leſſor, who had but an eſtate for life, dies; motion to ſtay judgment, becauſe the leſſee's title was determined. *Hale:* We can neither ſtay judgment or execution, the plaintiff muſt have his coſts and damages, for the declaration was good, and there was a term and an ejectment, and there is nothing in the pleading whereby we can take notice of the leſſor's eſtate. *Twiſden:* You ſhould have indorſed the leſſor's title on the back of the *poſtea*. *Anonymus Paſ.* 23 *Car.* 2.

Term in ejectment enlarged without conſent.

The term in ejectment being near expiring, it was amended, without any conſent, from five years to ten years. *Trin.* 21 *G.* 2. *B. R. Oates* v. *Shepherd.* 2 *Strange* 1272. A term expired enlarged without conſent, on ſeveral precedents being produced. *Carth.* 3. Sed vide *Salk.* 257. 6 *Mod.* 130. *Carth.* 402. *contra.*

Of ſetting aſide judgment in ejectment obtained fraudulently, one man perſonating another.

Serjeant *Wilmot* moved for reſtitution of poſſeſſion, the plaintiff obtained judgment in ejectment by default; for a man perſonating another made affidavit of notice, and ſo the

the tenant was turned out of poſſeſſion by execution. *Hale:* If it appears to be a practice, you ſhall have reſtitution. *Twiſden:* In *Winn*'s caſe, and in other caſes, the court ordered the party to bring him that made the affidavit, and then made ſuch a rule as the caſe required. *Anonymus, Paſch.* 23 *Car.* 2.

Declaration on a leaſe for five years, when the leſſor had but an intereſt for three years.

Ejectment, leſſee for three years makes a leaſe for five years to *A.* who brings this action, and this is ſpecially found. *Hale:* The plaintiff cannot maintain his ejectment, for there is no ſuch leaſe as he declares upon; the leſſor having but an intereſt for three years, cannot make a leaſe for five years; and if the leſſee recover, he muſt recover a term for five years, or nothing, for judgment for a leſs term will not be warranted by the declaration. *Jones* and *Drinkwater, Trin.* 27 *Car.* 2.

Amendment in ejectment denied. Andr. 208.

Trial at bar in ejectment, *Mich.* 8 *W.* 3. 1696. Verdict *pro. quer.* The declaration was of *Trinity* term before, the demiſe was laid on 10th *April* 1697. inſtead of 1696. *Habend.* from 25th *March* then laſt paſt; motion to amend by ſtriking out *ſeptimo* and inſerting *ſexto*, denied. *Aliter* in caſe of a judgment by confeſſion. *Paſch.* 9 *W.* 3. *B. R. Puleſton* v. *Warburton, Carth.* 401. *Par* v. *Cawley*, 1 *Mod.* 250, 252.

Error.

A Writ of error is a writ of right, a remedy at the common law, founded upon the fallibility of mankind.

Writs of error on judgment of Common Pleas, *or inferior courts, returnable in the court of* King's Bench.

Where a judgment is given in the *Common Pleas*, or in any inferior court of record, the party againſt whom the judgment is given, apprehending himſelf grieved thereby, and that the judgment is againſt law, or upon irregular proceſs, may have a writ of error iſſuing out of *Chancery*, returnable in this court.

No writ of error to be brought above 20 *years after judgment*, &c.

No fine, common recovery or judgment, in any real or perſonal action, ſhall be reverſed for error, unleſs the writ of error be brought and proſecuted with effect within 20 years. *Stat.* 10 & 11 *W.* 3. *c.* 14.

Where bail cannot bring error.

Bail cannot bring error of the principal judgment, nor can the principal and the bail join in error. 1 *Lev.* 137. *Cro. Car.* 561, 575. 3 *Danv. Abr.* 91. *p.* 14.

Where audita querela, *and not error, lies.*

Judgment againſt *A.* and *B. ſci. fa.* againſt *C.* as adminiſtrator of *A.* the ſurviving debtor, and judgment thereon; if *B.* was the ſurviving debtor, and not *A. C.* the adminiſtrator muſt bring an *audita querela*; a writ of error will not lie in this caſe. *Trin.* 5 *W.* & *M. B. R. Lampton* v. *Collingwood*, *Carth.* 282.

On judgment againſt two, one alone cannot bring error.

On a judgment againſt two in *C. B.* one alone brought a writ of error, but on demurrer it was quaſhed, becauſe both ought to join; and if one refuſes, he ſhould be ſummoned and ſevered, for otherwiſe every defendant

fendant might bring a writ of error by himſelf, and thereby delay the plaintiff, though the judgment might be affirmed once or oftner. *Trin.* 3 *Jac.* 2. *B. R. Hacket* v. *Herne*, *Carth.* 7.

Verdict for the plaintiff, who died before verdict given, *error port*; the plaintiff in error, after alledging the death of the plaintiff in the original action, ſhould conclude by praying a *ſcire facias ad audiendum errores* againſt the executor or adminiſtrator of the plaintiff in the original action; and if the ſheriff returns that he is alive, then he may come in and plead *in nullo eſt erratum*. But if he returns *ſcire feci* the executor or adminiſtrator, that will be ſufficient ground for the court to proceed and examine errors, *&c.* *Hil.* 6 *W.* 3. *B. R. Edmonds* v. *Probert*, *Carth.* 338. *Of error for death of the original plaintiff before verdict.*

Per Holt ch. juſt. A writ of error will lie on a judgment in ejectment *quod recuperet*, *&c.* before a writ of inquiry executed, for that is only as to the damages. *Carth.* 205. 3 *Cro.* 635. *Error in ejectment lies before inquiry.*

A writ of error is in judgment of law a *ſuperſedeas*, until the errors are examined, affirmed or reverſed. 17 *E.* 3. 46. *a.* *F. Executors* 76. 19 *H.* 6. 8. *a.* *F. Executors* 4. *B. Superſedeas* 17. 6 *H.* 7. 16. *Dyer* 244. *Hob.* 116. *Writ of error a* ſuperſedeas.

The allowance of a writ of error is the *ſuperſedeas*; the notice of its being allowed, relates only to the contempt in proceeding after ſuch notice. *Bur. Rep.* 340.

If the plaintiff does not ſhew his writ of error to the other party, or get it allowed by *Except.*

the clerk, by indorſing a *recepi* upon it within four days, (which time the court gives as convenient time for putting in bail according to the ſtatute,) the writ of error is no *ſuperſedeas*. Vent. 255.

Except. Alſo, if before the writ of error the ſheriff returns a *fieri feci, & non inveni emptores*, the execution is not to be undone. 1 *Vent.* 255.

As ſoon as allowed. The writ is a *ſuperſedeas* from the time of the allowance, and that is notice of itſelf; but if the defendant have notice before the allowance, it is from the time of that notice a *ſuperſedeas*. But though the allowance is notice of itſelf *quoad* to ſuperſede the execution, yet to bring the attorney into contempt he muſt have had actual notice.

As to an execution not executed. If the writ of execution be executed before a writ of error allowed, or notice, it may be returned afterwards.

2. as to the fraction of a day. The utmoſt length of time the law allows for executing, is the day whereon the writ is returnable, and it is not executable any longer that day than while the court ſits. So long as it is executable, but not executed, the allowance of a writ of error is a *ſuperſedeas*, but not afterwards. *Salk.* 321.

Judgment for the plaintiff, execution taken out, and error brought, which was ſealed about an hour before execution executed. The money ordered to be brought into court, and not delivered to the plaintiff. 1 *Vent.* 30.

Error in Exchequer *chamber on judg-* A writ of error being brought in the *Exchequer* chamber, on a judgment by original

in

in Banco Regis, is merely void, and no *ſuperſedeas* of execution.

ment by original in Banco Regis *void, and no* ſuperſedeas.

Judgment againſt ſeveral defendants, they all join in a writ of error, one of them dies before the return of the writ. *Per cur'*: Executions may be taken out againſt the ſurviving defendants without a *ſci. fa.* but a writ of error being brought and allowed, and the execution once ſuperſeded, the plaintiff cannot ſue out execution until the court is informed of the abatement of the writ of error; for in ſtrictneſs the matter ought to be ſuggeſted on record, and the court ought to adjudge the writ abated, *&c.* *Carth.* 404. Vide *Salk.* 219.

Several bring error, and one of them dies, no execution without leave.

By the *ſtat.* 3 *Jac.* 1. *c.* 8. execution ſhall not be ſtayed upon any writ of error for reverſing any judgment in any action or bill of debt upon any ſingle bond for debt, or upon any obligation, with condition *for the payment of money only*, or upon any action or bill of debt for rent, or upon any contract, unleſs the perſon ſuing ſuch writ of error ſhall with two ſufficient ſureties, ſuch as the court ſhall allow of, be bound by recognizance in double the ſum recovered to proſecute the writ of error with effect, and pay, (if judgment be affirmed) all debts, damages and coſts, adjudged on the former judgment, and all coſts and damages to be awarded for delaying execution.

On what judgment writ of error ſhall be no ſuperſedeas *without bail by* ſtat. 3 Jac. 1.

Bail (on bringing a writ of error) muſt begin (by *ſtat.* 3 *Jac. c.* 8.) in actions of debt upon ſingle bond, or upon obligation conditioned

tioned for payment of money only, or debt for rent, or upon any contract ſued in the courts of *Weſtminſter*, counties palatine, or great ſeſſions: a bond given by a third perſon, to a third perſon, as collateral ſecurity for a debtor's paying his creditors 15*s.* in the pound, upon a liquidated total of his debts, is a bond with condition for payment of money only, within the above act; and its being payable by inſtalments makes no difference. 2 *Bur. Rep.* 746, 747.

On what by ſtat. 13 Car. 2.

By the *ſtat.* 13 *Car.* 2. *ſtat.* 2. *c.* 2. §. 9. no execution ſhall be ſtayed by writ of error *after verdict* and judgment thereon in any action of debt upon 2 *E.* 6. for not ſetting out of tithes, action upon the caſe upon promiſe for payment of money, *action ſur trover*, covenant, detinue and treſpaſs, unleſs ſuch recognizance as by *ſtat.* 3 *Joc.* 1. be firſt acknowledged.

On what by 16 & 17 Car. 2.

And by the *ſtat.* 16 & 17 *Car.* 2. *c.* 8. §. 3. no execution ſhall be ſtayed by writ of error *after verdict* and judgment in any perſonal action, unleſs ſuch recognizance be firſt acknowledged, nor upon any judgment *after verdict* in dower, or *ejectione firmæ*, unleſs the plaintiff in error ſhall become bound, *&c.* But writs of error brought by executors and adminiſtrators, popular actions, actions on penal ſtatutes, (except on 2 *E.* 6.) indictments, preſentments, informations and appeals, are excepted.

In dower or ejectment the recognizance of plaintiff in error ſufficient.

Error in ejectment, plaintiff may find bail, need not be bound himſelf.

On error in ejectment, the plaintiff in error being in a remote part of the kingdom, found two ſufficient men to be his bail, who were bound in a recognizance, *&c.* The court

court held, that the intent of the ſtatute, which was to ſecure the defendant in error, was hereby fully obſerved, becauſe this bail is better than the plaintiff's own recognizance. *Paſch.* 2 *W. & M. B. R. Barnes* v. *Bulwer*, *Carth.* 121. Vide 1 Barnard. 83.

Writs of error out of inferior courts ſhall in all caſes be *ſuperſedeas's* without putting in bail, they being omitted out of the above ſtatutes. *No bail on writs of error from inferior courts.*

There is no bail to be put in upon bringing a writ of error upon a judgment in an action of debt upon bond conditioned for performance of covenants, or upon a bail-bond: but where bail is required to a writ of error upon a judgment in an action of debt upon a bond, the bond muſt be for the payment of money only, and that is by the very words of the ſtatute. *Nor upon judgment on bond for performance of covenants, or a bail-bond.*

If an action of debt be brought upon a bond to perform covenants, and there is judgment by default, without craving oyer of the condition, there, upon a writ of error brought, the plaintiff in error muſt put in bail, becauſe it doth not appear to the court upon the record, that the condition was for performance of covenants. *The condition muſt be upon record.*

Judic. pro Q. in *C. B.* in debt, *ſur inſimul computaſſet*, the defendant brought a writ of error in *B. R.* It was prayed that according to the *ſtat.* 3 *Jac.* 1. he ſhould put in ſureties by recognizance to pay the condemnation if the judgment ſhould be affirmed. *Et per cur'*: This caſe is out of the ſtatute, for the debt recovered did not accrue by any contract or *Judgment in debt* ſur inſimul computaſſet, *error brought, bail not neceſſary.*

other duty certain at firſt, but merely upon an account between the parties, which account had reduced divers uncertain ſums to one certainty; therefore, for that the original cauſe of action is founded upon the account, which is intirely uncertain, this cauſe is out of the ſtatute. The ſame law in debt upon an award, when the arbitrators have reduced divers controverſies to be recompenſed by one ſum, this is a debt, but not ſuch as is intended by the ſtatute. *Quod nota.* Hil. 10 Jac. 1. B. R. Girling *v.* ——, Yelv. 227. 2 Bulſt. 53.

Nor in debt upon an award.

Debt on obligation conditioned to pay to *B.* ſo much money as *J. S.* ſhould declare upon an account by him ſtated between the plaintiff and the defendant to be due from the defendant to the plaintiff; the defendant pleads that *J. S.* had not declared any thing due to the plaintiff. Iſſue thereon, judgment for the plaintiff, and error brought; by all the juſtices, except *Keeling*, the plaintiff in error muſt put in bail, or execution may go, for this obligation is made for the payment of money only, which, though it be not certain when the obligation is made, is yet certain before the action brought. *Paſ.* 15 *Car.* 2. *B. R.* Dean and Chapter of St. *Paul*'s againſt *Capel.* 1 *Lev.* 117. 1 *Keb.* 613, 690.

Bond to pay ſo much as J. S. *ſhould declare, &c. Error brought, no* ſuperſedeas *without bail.*

Judgment in *C. B.* in debt on a bond, with a condition to perform covenants in an indenture, and amongſt the reſt one was *for payment of money*, and the other were collateral, and the breach aſſigned was, *for not paying*

Bond to perform covenants, and one amongſt the reſt for payment of money.

paying the money. The defendant pleaded the ſtatute of uſury, and now it was moved, that the plaintiff in errror might put in bail, according to the ſtatute 3 *Jac.* 1. *c.* 8. But *per Holt* ch. j. This caſe is not within the ſtatute, for that relates to judgment upon bonds, with a condition *for payment of money only*, but the condition in the preſent caſe is not only for payment of money, but to do *collateral acts*; it is true, the breach aſſigned is for *non-payment of money*; and therefore the caſe upon the pleading is the ſame as if the condition of the bond had been for payment of money only; but yet this writ of error was allowed without bail. *Paſ.* 1 *W. & M. B. R. Gerard* v. *Danby*, *Carth.* 28.

Debt on bond to pay for all ſuch beer as Q. ſhould deliver to one S. *Error brought, bail not neceſſary.*

Debt on a bond, conditioned that the defendant ſhould pay to the plaintiff for all ſuch beer as he ſhould deliver to one *Stokes*, not exceeding 100 *l.* Plea, no beer delivered. Replication, beer delivered, *viz.* to the value of 80 *l.* Demurrer, Judgment for the plaintiff, and error brought. *Per cur':* Bail not neceſſary on this writ of error; the words of the ſtatute muſt be intended of a ſum certain, this ſum not certain even at the time the action was brought. It was inſiſted that the ſum was aſcertained by the pleadings; *ſed non allocatur.* And *Deniſon* juſt. ſeemed to doubt of the caſe in *Lev. Thurſday* 16 *June* 1743. *Thrale* againſt *Vaughan.* Et vide 2 *Str.* 954, 959. *Hardw.* 135, 181. 2 *Barnard. K. B.* 389. 2 *Str.* 1190. 1 *Str.* 476.

If

Executor or adminiſtrator bringing error on judgment de bonis propriis, *muſt put in bail.*

If judgment be againſt an executor or adminiſtrator *de bonis propriis*, and he brings a writ of error, he muſt put in bail in ſuch caſes, as required by the above ſtatutes, and pay coſts if judgment be affirmed; but if the judgment be *de bonis teſtatoris* only, he ſhall neither put in bail nor pay coſts.

A *ſcire facias* againſt the defendant as adminiſtrator on a *devaſtavit* alledged, and judgment *de bonis propriis*, on which he brought error; and by the whole court he ſhall find bail, for he being here charged in his proper goods, is not as in the caſe where an adminiſtrator is charged in the teſtator's goods, but here it is as in his own right. 1 *Lev.* 245. 1 *Sid.* 368. 2 *Keb.* 295, 371.

Bail cannot ſurrender plaintiff in error.

Bail on a writ of error cannot ſurrender their principal in diſcharge of themſelves, for the condition of the recognizance is, that the plaintiff in error ſhall proſecute his writ of error with effect, and if judgment be affirmed, ſhall ſatisfy and pay the debt, damages and coſts recovered, together with ſuch coſts as ſhall be awarded by occaſion of the delay of execution, or elſe that they (the bail) ſhall do it for him.

How to ſue out a writ of error.

To obtain a writ of error you muſt apply to the curſitor of the county wherein the action is laid, and he will make out the writ for you. You write a *præcipe* or note of inſtructions for the curſitor, according to the nature of the caſe, in the following manner:

London.

London. Writ of error for *William Cave*, at the ſuit of *Ferdinando Hoare*, on a judgment in caſe, given in the court of *Common Pleas.* Præcipe.

Dated Ret.

How to get writ of error allowed.

When you have got the writ of error from the curſitor, you carry it to the clerk of the errors of that court in which the judgment was given, and pay him for the allowance of it, and he will give you a notice in writing, to be delivered to the attorney on the other ſide, ſignifying the allowance of the writ of error, which notice you ſhould deliver immediately.

Writ of error to be allowed as ſoon as ſealed.

As ſoon as the writ of error is ſealed, it ought to be allowed with the clerk of the errors in that court where the judgment was obtained.

Proceeding after writ of error ſealed, no contempt without notice.

If the party proceeds after the writ of error ſealed, it is no contempt in him unleſs he had notice of it.

Four days after allowance to put in bail.

The plaintiff in error has four days after the allowance to put in bail, and the plaintiff in the action during that time cannot take out execution, yet the act of parliament ſays, there ſhall be no ſtay of execution 'till bail put in.

If no exception to bail within 20 days after notice, bail to be allowed.

As ſoon as bail is put in, notice of it ought to be given to the defendant or his attorney; and if the defendant does not except againſt them within twenty days after ſuch notice, the bail ſhall be allowed. *Mich. 5 W. & M.*

Upon rule for better bail, 4 days after notice to justify or put in better bail.

If the plaintiff in the action thinks the bail insufficient, he may have a rule from the clerk of the errors for better bail; and if the bail does not justify, or better bail be not put in within four days after notice of the rule, the plaintiff in the action may sue out execution; but the writ of error remains, and the plaintiff in error may proceed thereon, for the *supersedeas* to the execution is only taken away.

Plaintiff in error in ejectment to be bail himself, and justify, if required.

The Paintiff in error after a verdict in ejectment is allowed to be bail himself, but shall justify in court, if required, for tho' the statute says, that he shall give his own recognizance, yet it is to be in double the value of the year's rent, and he ought to be examined if he is worth so much.

Rule to transcribe.

On the allowance of the writ of error, and putting in bail, (where bail is required) the defendant in error may have a rule from the clerk of the errors for the plaintiff to certify or transcribe the record, which if he does not by the time appointed by the rule, a *nolle prosequi* may be entered.

Time taken by the clerk of the errors to transcribe.

If a writ of error on a judgment in the *Common Pleas* be returnable the first return of any term, the clerk of the errors takes the whole term to transcribe, and does not bring in the transcript 'till the last day of that term; and if it be returnable any other return, he takes the whole vacation to transcribe, and brings in the transcript on the first day of the following term.

Sci. fa. may be sued out as

The plaintiff in the action, as soon as the transcript is brought into the office of the chief

chief clerk, and entered in the book kept for that purpose, may make out a *scire facias quare executionem non.* *Soon as transcript brought in.*

If brought in before the essoin-day of any term, the *scire facias* may bear teste the last day of the preceding term, and if brought in within the term, it may be tested the first day of the term. *How the sci. fa. to bear teste.*

The plaintiff in error ought to enter the transcript on record the same term it is brought into the office, and if he neglects to do it, the defendant in error may, because they are both as it were plaintiffs. *If plaintiff in error don't enter transcript, defendant may.*

The attorney who first takes the transcript out of the office, ought to keep it no longer than until he can make a copy of it, and then ought to bring it back, and get his name discharged in the book, so that the attorney on the other side may likewise take it, and be enabled to make a copy of it. *Transcript to be kept no longer than till copy made.*

Where the proceedings in the inferior court were by original, the *scire facias quare executionem non*, and all the subsequent writs must be returnable at a general return, where by bill at a day certain. *How sci. fa. to be returnable.*

If error be brought on a judgment in the palace-court, the *scire facias* must be returnable on a general return, the days given below being their court-days, and not such return days as in this court. *How in error from the palace court.*

On the return of the *scire facias* where a *scire feci* is returned, or of the second *scire facias* where two *nihils* are returned, the plaintiff in the action may enter a rule for judgment, which is out in four days, and he is *On return of sci. fa. rule for judgment.*

not bound to give notice of it, or to call for an aſſignment of errors.

No oyer or plea to it, ſave an aſſignment of errors.

The court will not grant oyer of this *ſcire facias*, or allow any plea to it, ſave an aſſignment of errors. *Mich.* 5 *Geo.* 2. *B. R. Miles* v. *Wolſham.*

Where a ſci. fa. *to hear errors is not well brought.*

A *ſcire facias ad audiendum errores* is not well brought before the record of the judgment be certified into the court, to reverſe which the writ of error was brought, and errors aſſigned thereupon; for there is no record in court to warrant the granting the *ſcire facias* before the record of the judgment is certified, and errors thereupon aſſigned.

Plaintiff in error heard ex parte, *if defendant does not appear on* ſci. fa.

If the defendant in error does not appear on the *ſcire facias* to hear errors, the cauſe muſt be ſet down to be heard by the court, and the plaintiff in error ſhall be heard *ex parte*.

Errors to be ſigned by counſel, and copy delivered.

If the plaintiff in error aſſigns errors, which muſt be always ſigned by counſel, he muſt deliver a copy of them to the attorney for the defendant in error, before the time given by the rule on the *ſcire facias* is expired.

If general errors, defendant may immediately join in error.

If they be general errors, the defendant in error may immediately plead *in nullo eſt erratum*, and enter both on the roll, paying the plaintiff in error's attorney 2*s.* 4*d.* for the ſame.

Defendant in error may have a rule to return certiorari.

If the plaintiff in error aſſigns for error, that there is no original or warrant of attorney, or alledges diminution, that part of the record remains in the inferior court not certified, and prays a *certiorari*, the defendant

in

in error may immediately enter a rule to return the *certiorari*, and ſerve the plaintiff's attorney with a copy of it.

If certiorari be not returned and filed, defendant may join in error.

If the *certiorari* be not returned and filed in the office by the time limited in the rule, or within four days after ſervice of it, the defendant in error may join *in nullo eſt erratum*, and enter on record a *non miſit breve*, taking no notice of the diminution. Vide *Salk.* 267.

Defendant takes out a certiorari without giving a rule.

Error of a judgment in *C. B.* and the plaintiff aſſigned for error the want of an original; the defendant did not give a rule, but at his own proper charge took out a *certiorari*, and procured a certificate of an original; *ſed per curiam:* This is ill, for the error is not completely aſſigned until the certificate is returned, by which it appears that there was no original in the caſe. *Paſch.* 13 *W.* 3. *B. R. Sterling* and *Tanner*, *Comyns* 115.

If plaintiff's certiorari be for an original, &c. of a wrong term, defendant may ſue out a certiorari. When certiorari returned, defendant may join in nullo eſt erratum.

If a *certiorari* be prayed to certify an original writ or warrant of attorney of a wrong term, and the chief juſtice or *cuſtos brevium* return on it, that there is no original or warrant of attorney of that term, the defendant in error may make a ſuggeſtion of the right term, and pray a *certiorari*, which when returned and filed he may join *in nullo eſt erratum*, and enter it on the roll, paying the plaintiff's attorney 2*s.* 4*d.* for it.

If the ſecond original be of a different term, the defendant ſhould give a copy of it to the plaintiff's attorney.

Error of a judgment in *C. B.* the plaintiff aſſigned for error want of an original, and had a *certiorari*, upon which it was certified that there was no original; afterwards the defendant applied to the court of *Chancery*, and upon affidavit that inſtructions were given to the

the curſitor for an original, but they were loſt, the court of *Chancery* allowed that the original ſhould be ſupplied. Upon which the defendant in error prayed another *certiorari*, and an original was certified of the ſame term in which the default of an original was certified before. Whereupon it was moved that this was irregular; for before the ſecond *certiorari* was returned the defendant ought to have given a copy of the original to the attorney of the plaintiff; and the maſter informed the court, that the courſe was ſo when the ſecond original certified was of another term; but it being in this caſe of the ſame term, the motion was not allowed. *Paſch.* 13 *W.* 3. *B. R. Sir Richard Lewin* and ——, *Comyns* 118.

No diminution after in nullo eſt erratum *pleaded.*

After *in nullo eſt erratum* pleaded, no diminution can be alledged either by the plaintiff or defendant in error without leave of the court.

No diminution in records out of inferior courts.

In records out of an inferior court no diminution can be alledged, and the court muſt take them as they find them.

Court will award a certiorari ad informandum conſcientiam.

Although no diminution can be alledged, yet the court to inform their conſcience will award a *certiorari* to remove the original or other proceeding into this court for the affirmance of the judgment, though the court will not do it to reverſe the judgment. *Biſhop* v. *Harecourt*, 5 *Co.* 37. *b. Felton* v. *Weaver*, *Latch* 152. 3 *Danv. Abr.* 46. *p.* 1, 2. *Sed Winchcomb* v. *Goddard*, *Cro. Eliz.* 836. *contra.*

Upon

Upon the joinder in error either party may move for a *concilium*, and ſet the cauſe down with the clerk of the papers for the judgment of the court. *Either ſide may move for a* concilium.

Two days at the leaſt before the cauſe comes to be argued paper books are to be delivered to the judges, to the chief juſtice and ſenior puiſne judge by the plaintiff in error, and to the other judges by the defendant in error. *Vide Reg. Paſch.* 2 *Jac.* 2. *antea, fol.* *Books to be delivered two days before argument.*

As the court will hear no argument unleſs books be delivered to all the judges, it behoves the attorney, who expects the judgment of the court to be for his client, to deliver all the books, eſpecially as he will be allowed in coſts for thoſe copies he makes for the other ſide. *Mich.* 17 *Car.* 1. *Party who expects judgment ſhould deliver all the copies.*

The court has refuſed to hear any argument on the ſide of the party who hath neglected to deliver books, though he has been willing to pay the other ſide for them. *Party who delivers no books not to be heard.*

The courſe is the ſame as to the delivery of books in demurrers, and other like caſes which come before the court for their judgment. *Same courſe in demurrers.*

No execution for coſts occaſioned by the delay of execution ſhall iſſue againſt the bail in the original action, though they are liable for the debt and coſts, or damages recovered in the original action; but the bail in the writ of error are anſwerable for the whole. *Bail in original action not liable to coſts in error.*

If no errors are aſſigned, the plaintiff in error is to enter the *ſcire facias* (if one) of the term in which it is returnable, and if two, of *If no errors, of what term* ſci. fa. *to be entered,*

the term in which the firſt is returnable, with an award of execution, upon which any writ of execution may iſſue againſt the defendant or his goods, or a *capias ad ſatisfaciendum* againſt the defendant being firſt returned *non eſt inventus*, a *ſcire facias* may iſſue againſt his bail.

may thereupon iſſue.

Method of non-proſſing a writ of error.

Upon this judgment on the *ſcire facias* there being no coſts, the plaintiff in the action, to obtain the coſts he has been put to by the writ of error, muſt proceed to non-proſs it; and in order thereto muſt enter a rule to aſſign errors *de recordo* given by the ſecondary, and ſerve the attorney of the plaintiff in error with a copy of it; and if no errors be aſſigned by the time limited by the rule, or within four days after ſervice, he may ſign a non-proſs, and have coſts taxed according to the ſtatute.

One execution againſt defendant for debt and coſts in the original action, and coſts in error.

If no execution has been taken out on the judgment entered on the *ſcire facias*, one execution as againſt the defendant may be ſued out for debt and coſts, and damages in the original action, and for the coſts on the non-proſs.

Same proceedings on aſſigning error de recordo *as on* ſci. fa.

If the plaintiff in error, being ſerved with a rule to aſſign errors *de recordo*, does aſſign errors, (as he may) although execution of the judgment on the *ſcire facias* be actually executed, the proceedings muſt be the ſame as if errors had been aſſigned at firſt upon the *ſcire facias*; and if the judgment be reverſed, the plaintiff in error ſhall have reſtitution.

No coſts on amendment of writ of error.

No coſts are to be paid on any amendment of writs of error, purſuant to the ſtatute of amendments. *Stat.* 5 *Geo.* 1. *c.* 13.

But

But if the writ of error be quaſhed, the defendant in error ſhall have coſts. *Et vide* Fitz-Gibbon 201.

Coſts on amendment of aſſignment of errors.

If the plaintiff moves to amend the aſſignment in errors, the rule is with coſts, becauſe he comes for a favour of the court. *Fitz-Gibbon* 268.

No coſts where execution executed, and why.

If the defendant in the original action does not bring his writ of error before execution executed, the plaintiff ſhall not have his damages and coſts either on nonſuit, diſcontinuance, or judgment affirmed, becauſe the writ of error is not then *in dilatione executionis.*

Where plaintiff in ejectment ſhall have no coſts in error.

In ejectment, judgment *pro quer.* and execution of his damages and coſts; error brought, and judgment affirmed; plaintiff could not have coſts for his delay and charges; for no coſts were in ſuch caſe at the common law, and *ſtat.* 3 *H.* 7. *c.* 10 gives them only where error is brought in delay of execution; ſo 19 *H.* 7. *c.* 20. and though the plaintiff had not execution of his term, yet he had it of his coſts. 1 *Vent.* 88. *Cro. Jac.* 636. Vide *Andrews* 153, 155, 113.

Defendant in replevin ſhall have no coſts.

In replevin, plaintiff nonſuited, writ of error brought in *B. R.* and judgment affirmed, defendant in error ſhall have no coſts *pro dilatione executionis, &c.* (he being as plaintiff, and having judgment for a *return. habend.*) becauſe he is not within the letter of any of the ſtatutes, which ſhall be taken ſtrictly, coſts being in nature of a penalty. *Hil.* 2, 3 *W. & M. B. R. Coan* v. *Bowles*, *Carth.* 179. Andr. 113.

Plaintiff in formedon *no coſts in error.*

If on judgment in *formedon* in remainder, the tenant bring error, and judgment be affirmed, he ſhall pay no coſts, becauſe none recoverable at firſt. *Ibid.* 1 *Cro.* 3 *Cro.* 658.

Adminiſtrator ſhall pay no coſts in error.

Error in *B. R. port per adm. Judic.* affirmed, he ſhall pay no coſts, for he is not a perſon within the intent of the ſtatute, 13 *Car.* 2. *c.* 2. *Trin.* 7 *W.* 3. *B. R. Gale* v. *Till*, *Carth.* 281. *Sed vide antea, fol.*

When a writ of error abates by the death of the parties.

In a writ of error, if the defendant die, the writ is not abated, otherwiſe if the plaintiff die, *Sir H. Thyn* and *Corie.* A *ſci. fa. ad audiend. errores* went againſt the executor, when the defendant in error died. 1 *Vent.* 34.

When a writ of error abates by the death of the plaintiff in error, and when not.

If the plaintiff in error dies before errors aſſigned, the writ abates, and the defendant in error may ſue out a *ſcire facias* to revive the judgment againſt his executor; but if he dies after error aſſigned, and a joinder in error, it does not abate; and the defendant in error may proceed to get the judgment affirmed, but muſt then revive it againſt the plaintiff in error.

And in what manner execution may be taken out thereupon.

Treſpaſs againſt five. Plea not guilty. Verdict and judgment for the plaintiff. The five defendants ſue a writ of error for error in fact, and before the record is certified one of the plaintiffs in error dies. The plaintiff in the original action ſues out execution againſt all, *&c. Curia:* The writ of error was abated by the death of this plaintiff. If execution had been ſued againſt four defendants, omitting the fifth, this had been erroneous, becauſe it varies from the judgment which

which does not warrant it. If the execution could bear teſte the day of the judgment, (as it might if the plaintiff had not been delayed by the writ of error) and had been ſued againſt all five, this execution had been good, becauſe the death of the defendant was ſubſequent to the teſte of the writ of execution. If there are ſeveral plaintiffs in one writ of error, the death of one abates the writ, becauſe there cannot be any judgment according to the writ; but if there are ſeveral defendants in error, and one dies, it is otherwiſe, for they are not named in the writ. Queſtion, Whether the plaintiff in the original action, ought not to have ſued a *ſcire facias* before he took out execution? *Curia:* There is no need to ſue a *ſcire facias*, becauſe there was not any alteration of the record, nor any new perſon made liable to the execution. The execution ſued upon the death of the plaintiff in error was erroneous, becauſe the court was ſuperſeded by the writ of error; and this *ſuperſedeas* continues until the court be appriſed of the abatement of the writ of error by the death of the party, for they ought to certify the writ of error, or a matter of excuſe, which they cannot return, unleſs they are themſelves before certified of the death of the party, which may be by ſome ſuggeſtion or entry upon the record, *&c.* *Superſedeas quia improvide* awarded. *Trin.* 9 *W.* 3. *B. R. Penoyer* v. *Brace*, 1 *R. Raym.* 244. 1 *Salk.* 319. 5 *Mod.* 338. *Carth.* 404. *Comb.* 441. *Caſes B. R.* 130. *Holt* 640. 1 *Mod. Caſes* 108. 3 *Danv. Abr.* 332. *p.* 6.

Abates not by the death of the defendant in error.

If the defendant in error dies before or after errors aſſigned, the writ does not abate; if before errors aſſigned the plaintiff is bound to tranſcribe, and the executor of the defendant in error may ſue out a *ſcire facias* to ſhew cauſe why he the executor ſhould not have execution; upon which the plaintiff is to aſſign errors; and the proceedings in this caſe, as likewiſe where the defendant in error dies after aſſignment of errors, are to be carried on as if the defendant was alive till the judgment be affirmed, and then the executor of the defendant in error muſt revive by *ſcire facias*. Vide 1 *R. Raym.* 439. 1 *Salk.* 264.

When on abatement of writ of error execution may go, tho' a new writ be brought.

If the writ of error be abated by the act of the plaintiff in error, the defendant in error may take out execution, although a new writ of error be brought.

If a writ of error in ejectment, *&c.* abates by the act of God, a ſecond writ will be a *ſuperſedeas*; otherwiſe where it abates by the act of the parties. 1 *Vent.* 353.

Of returning the writ where divers records.

If there be divers records between the ſame parties, the inferior court may return which they pleaſe, they being warranted by the writ ſo to do.

How if judgment given after the return of the writ.

If judgment be given after the teſte and before the return of the writ of error, the record ſhall be removed; but if judgment be entered after the writ of error is returnable, the writ only is to be returned, and that no judgment is yet given.

Record varying from the writ.

If the record vary from the writ of error, yet the inferior court ought to remove it. 1 *Vent.* 96.

A writ of error that bears teſte before the judgment given, is good to remove the record, ſo as judgment be given before the return of it. 1 *Vent.* 255.

General errors aſſigned, and want of original and warrants of attorney, to which *nullo eſt erratum* pleaded, plaintiff moved to amend the errors aſſigned, but was denied. *After* in nullo eſt erratum, *can't amend general errors.*

Aſſignment of errors, replication *in nullo eſt erratum*, motion to amend aſſignment of errors denied, becauſe it was not to affirm, but to reverſe a judgment. *Hil.* 7 *W.* 3. *B. R. Walker* v. *Stokoe*, *Carth.* 367.

By *ſtat.* 5 *Geo.* 1. *c.* 13. all variances and defects, which vary the writ of error from the record, are amendable. No coſts are to be paid on ſuch amendments. Stat. 5 Geo. 1. c. 13. *Of amendments.*

An amendment ſhall not be made, after the court can't help ſeeing that the matter is upon record: for the whole muſt be ſuppoſed to be ſtill in paper. *Bur. Rep.* 322.

Amendment of a declaration in civil actions, may be made at any time while all is in the paper; and the like in penal actions, if the amendment be at common law; but the ſtatutes of amendment do not extend to penal actions. 2 *Bur. Rep.* 1098, 1099.

Where *in communi banco* judgment is for the plaintiff, and the defendant brings error, there ſhall only be judgment to reverſe the former judgment, for the ſuit is only to be eaſed of that judgment; but where the plaintiff brings error, the judgment ſhall not only be a reverſal, but the court ſhall give ſuch judgment, as the court below ſhould have *Where the plaintiff brings error, and the court reverſes, they give a new judgment; otherwiſe if the defendant brings error.*

done; for this writ of error is to revive the first cause of action, and to recover what he ought to have recovered by the first suit wherein the erroneous judgment was given. *Salk.* 262. *Mich.* 4 *W. & M. B. R. Baker* v. *Lade*, *Carth.* 253.

A scire facias against bail wrong.

Error on a judgment in the *Marshalsea* court, *sci. fa.* against the bail reciting the judgment, *Quod quidem record. certis de causis coram nobis venire fecimus.* Quashed. *Sci. fa.* should be thus, *Quod quidem record. cor. nobis causa erroris corrigend. venire fecimus.* Mich. 8 W. 3. B. R. Gillam *v.* Harnage, Carth. 391.

Judgment reversed on a writ of error by the opinion of three judges against two, and yet on every error singled out there were three judges against two for affirming the judgment. *Hil.* 7 *Jac.* 1. *Earl of Shrewsbury* against *The Earl of Rutland*, 1 *Bulst.* 4. 2 *Bulst.* 229.

Bail shall have time to surrender their principal, after a writ of error brought by him; but upon different terms, according to different circumstances. *Bur. Rep.* 340.

Error in the Exchequer *chamber.*

Writ of error no supersedeas till allowed.

EVery attorney who shall sue out any writ of error on any judgment of this court returnable in the *Exchequer* chamber, shall forthwith allow such writ of error with the clerk

clerk of the errors of this court for the time being, and no execution ſhall be ſtayed until ſuch allowance. *Eaſter* 36 *Car.* 2.

Where ſpecial bail is required, if the plaintiff upon ſuch writ of error does not within four days after the allowance thereof put in ſpecial bail, the plaintiff in the action may proceed to take out execution, notwithſtanding ſuch writ of error. *Eaſter* 16. *Eaſter* 36 *Car.* 2. *Bail in four days after allowance.*

If ſpecial bail is put in, the plaintiff in error, or his attorney, muſt forthwith give notice thereof to the defendant in error, or his attorney; and if the defendant in error does not except againſt ſuch bail within twenty days after ſuch notice, ſuch bail ſhall be allowed. *Mich.* 5 *W. & M.* *Notice of bail, and if no exception in 20 days, to be allowed.*

If the plaintiff in error after errors are aſſigned in the *Exchequer* chamber, intends to argue the ſame, he muſt give ten days notice thereof to the clerk of the errors in the ſame court before they ſhall be argued by counſel on either ſide; and the attorney for the plaintiff in error ſhall deliver four copies of the book to the juſtices of the *Common Pleas*, and the attorney for the defendant ſhall deliver four copies to the barons of the *Exchequer* four days before the hearing of the cauſe. *Eaſter* 33 *Car.* 2. *Ten days notice to the clerk of the errors before argument.* *Plaintiff to deliver four books to judges* C. B. *defendant four to the barons.*

The *Exchequer* chamber doth not award *ſci. fa. ad audiend. errores*, but notice is given to the parties concerned. 1 *Vent.* 34. *No* ſci. fa. *in* Exchequer *chamber.*

An erroneous judgment given in this court was reverſible only in parliament, 'till the ſtat. 27 *Eliz. c.* 8. whereby upon any judgment Stat. 27 Eliz. c. 8. *Juriſdiction of* Exchequer *chamber in error, on judgment in* B. R.

ment given in the court of *King's Bench* in debt, detinue, covenant, account, action upon the caſe, *ejectione firmæ*, or treſpaſs, *firſt commenced* there (where the king is not a party) the party againſt whom the judgment ſhall be given may *at his election* ſue forth a writ of error directed to the juſtices of the common bench and barons of the *Exchequer*, or any ſix of them (being of the degree of the coif) who ſhall reverſe or affirm ſuch judgment other than for error concerning the juriſdiction of the *King's Bench*, or want of form in any writ, record, plaint, bill, declaration, or other proceeding, and after reverſal or affirmance, the record ſhall be remanded, that the court of *King's Bench* may proceed thereupon.

Error in parliament from the Exchequer *chamber.*

Yet after ſuch reverſal or affirmance, the party who apprehends himſelf grieved may have a writ of error returnable in parliament.

When ſuit by original error lies only in parliament.

Where the ſuit is by original a writ of error lies in parliament only, and not elſewhere, as not being firſt commenced in the court of *King's Bench*, but in another court, *viz.* the court of *Chancery*.

And where the ſuit in *B. R.* is by bill, the party may ſue forth a writ of error in parliament, for the ſtatute gives him his election. *Shower's P. C.* 56. And I apprehend that if the party brings a writ of error *in Camera Scaccarii*, whereby he has made his election, and be there nonſuited, he may afterwards have a writ of error returnable in parliament. *Sed quære.*

Bail

Bail cannot have a writ of error in the *Exchequer* chamber by the *ſtat.* 27 *Eliz. c.* 8. which gives it only in ſeven caſes therein mentioned. *Lancaſter* v. *Keyleigh*, *Cro. Car.* 286, 300. 1 *Jones* 325. *Godb.* 440. 3 *D. A.* 10. *p.* 27. *Cro. Car.* 408, 481. *Cro. Jac.* 171, 384. *Hob.* 72.

Bail cannot have error in Exchequer *chamber.*

Error does not lie in the *Exchequer* chamber upon a judgment upon a *ſcire facias* only in the *King's Bench*, becauſe it is *caſus omiſſus* out of the *ſtat.* 27 *Eliz.* which gave writs of error returnable in the *Exchequer* chamber upon judgment recovered in the *King's Bench* by bill. *Cro. Eliz.* 730, 733. *Hob.* 72. *Cro. Jac.* 384. *Yelv.* 157. See 1 *Mod.* 79, 297. 1 *Vent.* 38, 168. 1 *R. Raym.* 98.

Error lies not in the Exchequer *chamber on a judgment upon a* ſci. fa. *Vide* Andr. 287.

In an action *qui tam* upon a ſtatute where the king is to have a part, error lies only in parliament.

No error in Exchequer *chamber in* qui tam, nihils *returned.*

ſcand. mag. *on* ſci. fa *againſt bail after two*

No writ of error to reverſe a judgment in an action *qui tam*, *&c.* lies in the *Exchequer* chamber, becauſe the king is party; ſo alſo upon the *ſtat. de ſcandalis magnatum. Lord Say and Seal* againſt *Stephens*, *Cro. Car.* 135, 142. 1 *Vent.* 40. Where a *ſci. fa.* goes againſt the bail in this court, and two *nihils* are returned, and judgment is had thereupon, no writ of error can be brought in the *Exchequer* chamber, but in the parliament only. 1 *Vent.* 38, 168.

Alſo after ſuch a return it cannot be aſſigned for error, that there was no *capias* awarded againſt the principal, but in that caſe the bail is relievable only by *audita querela*;

After ſuch return, bail relievable only by audita querela.

la; but if the ſheriff returned a *ſcire feci*, they might plead it. *F. N. F.* 104. 1 *Vent.* 38.

Error quod coram vobis reſidet *lies not in* Exchequer *chamber.*

On a writ of error in the *Exchequer* chamber, a *ſcire facias ad audiend. errores* was awarded, returnable 11 *May*, and there not being a ſuch day of adjournment, it was held to be a diſcontinuance, and that a writ of error *quod coram vobis reſidet* lies not in this court, which has its power from ſeveral ſtatutes, and can only reverſe or affirm, and remand to the *King's Bench* for execution, and when the plaintiff is nonſuited, or the writ is diſcontinued, they have no more to do with it, for they have no record before them, but it remains in the *King's Bench*. And though ſeveral precedents were produced where writs of error *quod coram vobis*, &c. were allowed, no regard was had to them, they paſſing without debate. *Cave* v. *Polewheel*, *Cro. Jac.* 616, 620.

Error in fact not aſſignable in Exchequer *chamber.*

The court of *Exchequer* chamber hath nothing to do with errors in fact; for the court of *King's Bench* had power to examine matters in fact in their own judgments before the ſtatute; and the ſtatute extends only to ſuch caſes as had no other remedy but in parliament. 2 *Lev.* 38. 1 *Vent.* 207. 2 *Mod.* 194. That matter of form cannot be aſſigned, appears 1 *Sid.* 253.

Error of a judgment in *B. R.* in caſe *ſur aſſumpſit*, where on *non aſſumpſit* pleaded, a verdict and judgment was for the plaintiff, 11 *Feb.* 11 *Geo.* 2. which was in *Hilary* term following, the plaintiff in error comes in pro-

per perſon before the juſtices of *C. B.* and barons of the *Exchequer*, and aſſigns for error, that it appears by the record, that in *Eaſter* 10 *Geo.* 2. he defended and pleaded to iſſue by *Richard Ednel* his attorney, whereas he was then an infant under the age of twenty-one years. Defendant in error pleads *in nullo eſt erratum*, and prays that the judgment may be affirmed. Caſes cited for the plaintiff, *Cro. Eliz.* 731. *Cro. Jac.* 5, 303. *Cro. Car.* 513. *Hob.* 5. 1 *Jones* 410. For the defendant, 2 *Lev.* 38. 1 *Vent.* 207. 2 *Mod.* 94. 1 *Sid.* 253. *Hil.* 1738. All the juſtices and barons agreed, that error in fact could not be aſſigned, nor was it examinable in the *Exchequer* chamber; that *in nullo eſt erratum* was in the nature of a demurrer to it, and that judgment ought to be affirmed; upon which it was moved, that the plaintiff in error might diſcontinue his writ upon payment of coſts, which was granted *niſi cauſa*, and afterwards made abſolute; but afterwards *Eaſter* 1739. upon affidavit that the coſts were taxed and had been demanded, and that the plaintiff in error refuſed to pay them, the rule for diſcontinuing the writ of error was diſcharged, the cauſe was again put into the paper, and the judgment affirmed. *Hill.* 11 *Geo.* 2. *Roe* v. *Sir John More, Bart. Comyns* 97.

Judgment *pro. def.* in *B. R. ſur* ſpecial verdict, judgment reverſed in *Exchequer* chamber, that court doth, beſides the judgment of reverſal, give a complete judgment *quer.* viz. *quod recuperet.* Trin. 6 W. 3. B. R.

May beſides reverſal give compleat judgment.

B. R. Philips v. Bury, Carth. 319. 1 R. Raym. 10.

Exchequer chamber cannot award a writ of inquiry.

Judgment *pro def.* on demurrer reverſed in *Exchequer* chamber, and judgment *quod quer. recuperet, &c.* But becauſe they wanted power to award a writ of inquiry, it was ſent into *B. R.* for the execution of that writ, and thereupon to give final judgment. *Hil.* 2, 3 *W. & M. B. R. Philips* v. *Bury, Carth.* 181, 319. *Comb.* 314. 1 *R. Raym.* 10. *Cro. Eliz.* 746, 747. *Yelv.* 74, 75, 76. *Cro. Jac.* 206. *Dyer* 343, 373. 4 *Inſt.* 72. *Fitz. N. B.* 19 *D. Yelv.* 118, 119. 2 *Saund.* 234, 256.

Of execution on abatement in Exchequer *chamber.*

Error port per 6. in *Exchequer* chamber; 3 die, a *remittitur* ſhould be entered to warrant execution in *B. R.* againſt the ſurvivors. *Carth.* 236.

Where writ of error abates in Exchequer *chamber, judgment is not in* B. R. *without a* remittitur.

Where a writ of error determines in the *Exchequer* chamber by abatement or diſcontinuance, the judgment is not again in the *King's Bench*, till there be a *remittitur* entered, for without ſuch *remittitur*, it cannot appear to the court of *King's Bench*, but that the writ of error is ſtill pending *in camera ſcaccarii.*

Debt on a judgment pending error in Exchequer *chamber.*

In treſpaſs 300 *l.* damages were recovered, and judgment thereon, and error brought thereof in the *Exchequer* chamber, pending which the plaintiff brought an action of debt in this court for the 300 *l.* and by all the judges, except *Kelynge*, it well lies, for the record itſelf is yet in this court, and the writ of error is a *ſuperſedeas* only. 1 *Lev.* 153. Vide 1 *R. Raym.* 47. *Yelv.* 29. *Cro. Eliz.* 734.

734, 822. 2 *Vent.* 261. 4 *Mod.* 247. *Carth.* 2. *Skin.* 496.

A judgment in debt is had in the *King's Bench*, and a writ of error is brought, it ſtill remains a record of the *King's Bench*, and an action of debt may be brought upon the judgment. 1 *Vent.* 34.

Error tam in redditione Judicii quam in adjudicatione Executionis.

Where bail may have it.

BAIL may bring a writ of error *tam in redditione judicii quam in adjudicatione executionis* upon a judgment recovered againſt them by *ſcire facias*.

It lies not in camera ſcaccarii *on an Award of Execution after judgment affirmed there.*

On a judgment for the plaintiff in the *King's Bench*, affirmed in the *Exchequer* chamber, and an award of execution in *B. R.* on a *ſcire facias* brought by plaintiff, the defendant cannot have a writ of error in the *Exchequer* chamber *tam in redditione judicii quam in adjudicatione executionis* (*aliter* if there had been no writ of error before on the original judgment); for the merits of the firſt judgment have been examined, and ſuch ſecond writ is no *ſuperſedeas*, and execution ſued out will be no contempt. See *Salk.* 263.

Bail cannot join the principal with himſelf in a writ of error.

Writ of error brought by bail on a judgment againſt him by *ſcire facias* in an inferior court, and it was *tam in redditione judicii* againſt the principal, *quam in adjudicatione executionis* againſt the bail; but it was quaſhed

ed against the principal, and the bail proceeded to reverse the judgment against him. *Vide antea.*

Error coram nobis residen'.

If a judgment in this court be erroneous in matter of fact, writ of error lies in this court to reverse it, but not if erroneous in point of law. Meggot *v.* Broughton, Cro. Eliz. 105.

IF a judgment given in this court be erroneous in matter of fact only, and not in point of law, a writ of error *cor. nobis residen.* may be brought in this court, where the judgment was given to reverse it; but if the judgment be erroneous in point of law, then a writ of error cannot be brought in this court to reverse it. Error in fact, is not the error of the judges, and therefore the reversing of a judgment given by them, which is only erroneous in matter of fact, is not reversing their own judgment; but it is otherwise if the judgment were erroneous in matter of law, for they cannot be thought to reverse their own judgment.

Error quod coram vobis, &c. *after first writ discontinued.* 1 Str. 607.

Where after errors assigned the writ is discontinued, plaintiff may have another writ *quod coram vobis residet*, and upon that may assign other errors either within or without the record, and is not bound to the same errors assigned upon the first writ. Also this must be entered upon the same roll with the first, that the court may see all together. *Yates* v. *Windham*, *Cro. Eliz.* 155, 281. Writ once good, but abates by plea or death, inferior court cannot proceed, but the superior court, and the party may have a new writ *quod coram vobis residet*; but where the writ

writ is ill, as to remove a record of a judgment, *quod fuit in curia noſtra*; where it was in the time of a predeceſſor, *aliter*. *Dun* v. *Dean*, *Latch* 198. *N. B.* 71.

But error *coram vobis* lies not after affirmance. 1 *Str.* 690. 2 *Str.* 949, 975. *Not after affirmance.*

Error *coram nobis reſiden.* lies not in the *Exchequer* chamber. *Antea.* *Error* cor nobis reſiden. *lies not in the* Exchequer *chamber.* Cro. Jac. 616, 620.

This writ is allowed in court by the ſecondary, and becauſe none of the ſtatutes, which oblige the plaintiff in error to put in bail, extend to this writ of error, it is ſaid to be no *ſuperſedeas* but by leave of the court. Vide *Carth.* 367. *Of allowing it, and whether a ſuperſedeas without leave of the court.*

But a modern reporter in a caſe of *Belt* againſt *Collins*, *Trin.* 9 *Geo.* 1. ſeems to ſay, that a writ of error *coram nobis reſiden.* may be allowed by the ſecondary in vacation, and that it is a good *ſuperſedeas* from the allowance even without notice.

Lampton was bail for *J. S.* in an action brought againſt him by *Collingwood*, and judgment was given againſt *J. S.* upon which *Collingwood* ſued out a *ſcire facias* againſt *Lampton*, and upon two *nihils* returned judgment was entered againſt him; whereupon *Lampton* brought a writ of error *coram nobis reſiden'*, and aſſigned for error in fact, that *J. S.* died before any *ca. ſa.* was ſued againſt him; upon which the defendant took iſſue, and a verdict was found for the plaintiff. Adjudged, that a writ of error would not lie in this caſe, for there is no error in the court; *Where there is no error in the court, error* coram nobis *will not lie.*

May have Audita querela.

court; but it is reaſonable that the party ſhould have an *audita querela*, becauſe he had not notice to come in and plead that matter. *Mich.* 6 *W. & M. Lampton* v. *Collingwood*, 1 *R. Raym.* 27. 4 *Mod.* 306. *Salk.* 262. *Carth.* 282.

Errors to be aſſigned on motion.

The way to compel the plaintiff to aſſign errors, is by motion in court, and he muſt aſſign errors immediately on ſervice of the rule.

How judgment reverſed on error in fact.

On errors in fact aſſigned, if found for the plaintiff on trial, he muſt move to put the cauſe in the paper for argument, and then upon producing the *poſtea*, the court will give judgment of reverſal.

On error in fact defendant may carry the cauſe to trial without proviſo.

Error in fact aſſigned in a judgment in dower, *viz.* that the tenant was an ideot, and appeared by attorney, iſſue being taken on the ideocy, the plaintiff gave notice of trial next aſſiſes, and after countermanded it, nevertheleſs the defendant in error carried it down to trial the ſame aſſiſes without a proviſo; and held good *per cur.* for he was an actor in the firſt ſuit, and is the party delayed by this means; and the iſſue was found for the defendant in error, and the judgment affirmed, and a precedent was cited, wherein it was ſo done in a writ of error out of *Ireland* 2 Lev. 5.

Judgment reverſed for death of one of the defendants before verdict.

Treſpaſs, verdict and judgment againſt five defendants in *C. B.* but one of the defendants died before the verdict. *Error port per* the four ſurviving defendants; but the writ being ill, becauſe it did not ſet forth that the fifth defendant was dead, the plaintiff in error prayed a new writ of error *cor. vobis reſiden.* the plaintiffs on another day moved for

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a *ſuperſedeas*, becauſe the writ was not a *ſuperſedeas* of itſelf, as the firſt writ of error was; and a *ſuperſeders* was granted, and the plaintiffs put in bail thereon; error aſſigned that one of the five defendants died before verdict; iſſue and verdict thereon; but exception being taken to this writ of error, it was alſo quaſhed. Motion for a new writ of error *cor. vobis reſiden.* and a *ſuperſedeas*, which was granted on putting in bail; but the *ſuperſedeas* was oppoſed as being the third writ of error; *ſed per cur.* This is the firſt writ of error *coram nobis reſiden.* for the other was void. Verdict for plaintiffs in error on the above iſſue. Judgment reverſed. *Hil.* 7 *W.* 3. *B. R. Walker* v. *Stokoe. Carth.* 367. 1 *Rol. Abr.* 755, is wrong, as appears by *Yel.* 117. and that *Salk.* 337. is ſo, vide *Lill. Ent.* 278. vide 2 *Lev.* 38. 3 *Keb.* 28. 1 *Mod.* 285. 1 *Vent.* 207, 208. *Carth.* 369. *Show.* 349. *Et Q.* the reſolutions, *Lambden* v. *St. John. Hil.* 12 *Geo.* 1. *Merrifield* v. *Wellen, Trin.* 2 *Geo.* 2. *Thompſon* v. *Lyon, Paſch.* 4 *Geo.* 2. *Herne* v. *Buſhel, Paſch.* 6 *Geo.* 2. *Weele* v. *Smith, Trin.* 6 *Geo.* 2 *Harris* v. *Burley, Paſch.* 7 *Geo.* 2.

This writ no ſuperſedeas without motion.

Though two writs of error quaſhed, a third granted, and alſo a ſuperſedeas.

Error from Ireland.

THE method of compelling the plaintiff in the writ to aſſign errors, is by motion in court, and he will be ordered to aſſign errors within a week after ſervice of the rule: and if the plaintiff, his attorney or agent, cannot be found, the court will order that

Plaintiff to aſſign errors on motion.

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Plaintiff to aſſign errors on motion.

sticking up the rule in the public office, shall be good service on the plaintiff in error.

By like rule defendant to join.

And the plaintiff in error must move the court for a rule for the defendant to join in errors, and he has four days to do it in after service of the rule.

Must be an affidavit verifying errors assigned.

On an assignment of errors from *Ireland* there must be an affidavit annexed, verifying the same.

If judgment affirmed, execution must be awarded in Ireland.

If the judgment is affirmed, the record is transmitted to *Ireland*, and the court there awards execution.

No sci. fa. ad audiend. error.

No *scire facias ad audiendum errores* lies here upon a writ of error on a judgment in *Ireland*, but a rule of court to assign errors. *Butler* against *Zanchy*, *Hil.* 21, 22 *Car.* 2. Vide 2 *Keb.* 590.

Of bringing in and copying the transcript.

When the transcript is brought over from *Ireland*, it is to be lodged with Mr. *Hawley* the signer of the writs, from whom first the plaintiff in error, and then the defendant in error takes it out and copies it.

Of obtaining execution for default of transcribing.

If the plaintiff in error does not bring in the transcript, and thereby delays the defendant of his execution, the defendant must obtain a certificate from Mr. *Hawley*, with whom the transcript ought to be lodged, that the transcript is not brought in; whereupon the cursitor will make out a writ *de executione judicii*, directed to the chief justice in *Ireland*.

Of execution on affirming the judgment.

If the judgment be affirmed with costs, no execution can be had here; an original execution cannot issue into a foreign county, and this court cannot issue an execution into the county

county (in *Ireland*) where the action was brought in order to ground a *teſtatum*. *Mich.* 10 *W.* 3. *B. R. Coot* v. *Lynch*, *Carth.* 460.

Ejectment in *B. B.* in *Ireland*; *judic. pro def.* error in *B. R.* in *England*, and judgment reverſed, and judgment given *quod quer. recuperet terminum*, &c. And reſolved, that there ſhould be a writ directed to the chief juſtice in *Ireland* to reverſe that judgment, and commanding to award execution. *Cro. Car.* 368. *Of reverſing a judgment given for the defendant in* Ireland.

The houſe of Lords in *Ireland* have no juriſdiction to affirm, or reverſe any judgment or decree, made in any court in that kingdom. *Stat.* 6 *Geo.* 1. *c.* 5. §. 2.

Error in parliament.

A Writ of error that is brought in the parliament, is made returnable immediately, or upon a prorogation *ad proximum parliamentum*, becauſe that court, during the ſeſſion of it, ſits continually, and has no vacation; and it is for the honour of that high court to be immediately attended, that they may do the ſpeedier juſtice; the proceedings there are very expeditious, there being no *ſcire facias*; but upon a motion made in the houſe by one of the peers, a day is appointed for the plaintiff in error to aſſign his errors, and after iſſue is joined on *in nullo eſt erratum*, upon another motion made in manner aforeſaid, their lordſhips appoint a *How a writ of error in parliament is made returnable.*

day for the hearing of the errors; at which day both parties must attend with their counsel; but neither party must have more than two counsel to plead for him.

Error lies not from the court of Exchequer *to the house of lords.*

Error lies not from the court of *Exchequer* to the house of lords, for the *Exchequer* chamber interposes. *Salk.* 511. 4 *Inst.* 21. 31 *Ed.* 3.

Where judgment reversed in parliament, they give the same judgment as B. R. *ought to have done.*

Action in the court of *King's Bench* by original, judgment for the defendant on a special verdict, and error brought in parliament; if the parliament reverse the judgment, they will give the same judgment as the court of *King's Bench* ought to have done. *Philips* v. *Bury*, *Carth.* 180, 319. 1 *R. Raym.* 9, 10, *Show. P. C.* 57. *Q.* How it would be if the judgment was upon a demurrer, and a writ of inquiry necessary. *Vide antea*, *fol.*

Suing in the court below, pending a writ of error in parliament, is a contempt and breach of privilege. Str. 443.

Debt for an escape, and judgment thereon in *C. B.* error in *B. R.* and bail thereon, judgment affirmed, error in parliament; pending which the plaintiff took out execution against the bail, who petitioned the house of lords against the attorney who took out the execution, alledging it to be a contempt and breach of privilege. Resolved, that it was a contempt and breach of privilege, and the plaintiff's attorney ordered to make restitution of the goods taken in execution, which was accordingly done; but the lords being informed that the judges held it no contempt at law, spared the costs in this case as to the attorney who sued out the execution. 1 *Will.* 685.

Forasmuch

Foraſmuch as upon writs of error return- *Proceedings on writs of error in parliament.*
able in this high court of parliament, the plaintiffs therein often deſire to delay juſtice, rather than to come to the determination of the right of the cauſe; it is therefore ordered by the lords ſpiritual and temporal in parliament aſſembled, That the plaintiffs in all ſuch writs, after the ſame and the records be brought in, ſhall ſpeedily repair to the clerk of the parliament, and proſecute the writs of error, and ſatisfy the officers of this houſe their fees juſtly due unto them, by reaſon of the proſecution of the ſaid writs of error, and the proceedings thereupon, and further ſhall affign their errors within eight days after the bringing in of ſuch writs with the records; and if the plaintiff makes default ſo to do, then the ſaid clerk, if the defendant in ſuch writs require it, ſhall record that the plaintiff hath not proſecuted his writ of error; and that the houſe doth therefore award that ſuch plaintiff ſhall loſe his writ, and that the defendant ſhall go without day, and that the record be remitted; and if any plaintiff in any writ of error ſhall alledge diminution, and pray a *certiorari*, the clerk ſhall enter an award thereof accordingly; and the plaintiff may, before *in nullo eſt erratum* pleaded, ſue forth the writ of *certiorari* in ordinary courſe, without ſpecial petition or motion to this houſe for the ſame; and if he ſhall not proſecute ſuch writ, and procure it to be returned within ten days next after his plea of diminution put into this houſe, then unleſs he

Errors to be aſſigned in 8 days, or non proſ *and* remittitur.

If diminution alledged, and certiorari *prayed.*

Certiorari *to go without motion, and be returned in ten days.*

shall shew some good cause to this house for the inlarging of the time for the return of such writ, he shall lose the benefit of the same; and the defendant in the writ of error may proceed as if no such writ of *certiorari* were awarded. *Ordo dom. procer. die Veneris* 13 *Dec.* 1661.

Or lose benefit thereof, and defendant to proceed as if none awarded.

Printed cases to be signed.

The house taking notice, That upon appeals and writs of error, there have been of late several scandalous and frivolous printed cases delivered to the lords of this house; for preventing whereof for the future, it is this day ordered by the lords spiritual and temporal in parliament assembled, That no person whatsoever do presume to deliver any printed case or cases to any lord of this house, unless such case or cases shall be signed by one or more of the counsel who attended at the hearing of the cause in the courts below, or shall be of counsel at the hearing in this house: and this order to be added to the roll of standing orders, and affixed on the doors of this house and the courts in *Westminster. Ordo dom. procer. die Martis* 19 *Aprilis* 1698.

No putting off a day of hearing without notice of two days, and oath thereof.

Upon consideration of the great inconveniencies arising by motions and petitions for putting off causes, after days have been appointed for hearing thereof, it is ordered by the lords spiritual and temporal in parliament assembled, that when a day shall be appointed for the hearing any cause, appeal, or writ of error, argued in this house, the same shall not be altered but upon petition; and that

no petition ſhall in ſuch caſe be received, unleſs two days notice thereof be given to the adverſe party, of which notice oath ſhall be made at the bar of this houſe: And it is further ordered, that this order be added to the roll of ſtanding orders. *Ordo dom. procer. die Mercur.* 22 *Dec.* 1703.

Certificates to be given of certiorari's being awarded concerning writs of error.

Ordered, that in all caſes upon writs of error depending in this houſe, when diminution ſhall be at any time alledged, and a *certiorari* prayed and awarded before *in nullo eſt erratum* pleaded, the clerk of the parliaments ſhall, upon requeſt to him made, give a certificate that diminution is ſo alledged, and a *certiorari* prayed and awarded thereupon: And it is further ordered, that this order be entered on the roll of the ſtanding orders of this houſe. *Ordo dom. procer. die Veneris* 21 *Feb.* 1717.

How counſel are to proceed at hearing cauſes.

Upon report from the committee of the whole houſe, appointed to take into conſideration matters relating to the proceedings on appeals and writs of error; it is ordered by the lords ſpiritual and temporal in parliament aſſembled, that at the hearing of cauſes for the future, one of the counſel for the appellants ſhall open the cauſe; then the evidence on their ſide ſhall be read; which done, the other counſel for the appellants may make obſervations on the evidence: Then one of the counſel for the reſpondents ſhall be heard, and the evidence on their ſide to be read; after which the other counſel for the reſpondents

ſhall

ſhall be heard, and one counſel only for the appellants to reply. *Ordo dom. procer. die Sabbat.* 2 *Mart.* 1727.

Writ of error diſcontinued by prorogation, a ſecond writ no ſuperſedeas.

A writ of error returnable in parliament, diſcontinued by the prorogation of the parliament: Another writ brought teſte the laſt day of the ſeſſion, *viz.* 1 *March*, returnable 19 *November*, the day to which it was prorogued. The court reſolved, that though the firſt writ was not diſcontinued by any act of the party, yet this ſecond ſhould be no *ſuperſedeas*——That a writ of error returnable *ad proximum parliamentum* could not be good; but here the parliament was prorogued to a day certain that in regard of the length of time in the return it ſhould be no *ſuperſedeas.* 1 *Vent.* 31.

If returnable ad prox. parliament' *no* ſuperſedeas.

When a ſecond writ of error a ſuperſedeas, *and when not.*

If a writ of error be brought in the *Exchequer* chamber, and that being diſcontinued, another is brought in parliament, this ſecond writ is a *ſuperſedeas.* But if a writ of error be brought in parliament, and that abates, and the plaintiff brings a ſecond, this is no *ſuperſedeas*, becauſe it is in the ſame court. 1 *Vent.* 100.

Prorogation of parliament no diſcontinuance of a writ of error.

A writ of error teſte 30 *Nov. ult.* returnable in parliament 13 *April* next, the day to which parliament was prorogued. *Hale*: The lords have lately declared, that prorogation does not determine a cauſe depending in parliament by writ of error; but that comes not to this caſe, the writ not being returned. A writ of error returnable *ad proximum parliamentum* is not good; but otherwiſe

if they are ſummoned or prorogued to a day certain. A writ of error bore teſte 10 *Nov.* and returnable 1 *Nov. prox. futur.* and the record was ſent into the *Exchequer* chamber, a *mittimus* indorſed upon the roll here; and it was reſolved execution might be taken out, becauſe of the long return. 2dly, That tho' there were a *mittimus* upon the roll, yet the record remained here until the return of the writ to all purpoſes.

Writ of error with a long return no ſuperſedeas.

The opinion of the court, the writ of error was no *ſuperſedeas*, but would make no rule, becauſe not judicially before them; but party muſt take out execution if he thought fit, and then, if the other ſide moved for a *ſuperſedeas*, would reſolve the point. 1 *Vent.* 266. 2 *Lev.* 120.

A writ of error does not determine by a prorogation of the parliament. 2 *Lev.* 93.

Error not determined by prorogation.

If on a judgment in the *Common Pleas*, a writ of error brought in this court, bail put in according to the ſtatute, and judgment affirmed, a writ of error be brought in parliament, the party muſt give a new recognizance, for the firſt recognizance does not include payment of coſts to be aſſeſſed in the houſe of lords. *Salk.* 97.

Upon error in parliament of judgment affirmed in B. R. *new bail required.*

GEORGE the third, by the grace of God, of *Great Britain*, *France* and *Ireland* king, defender of the faith, &c. To the ſheriff of *Middleſex* greeting: Whereas *Mardaduke A.* lately in our court, before Sir *Edward N.* knt. Sir *J. P.* knt. and Sir *John P.* knt. our juſtices of the bench at *Weſtminſter*, by

Scire facias quare executionem non *in debt, on judgment, removed out of the court of* Common Pleas *by writ of error into the* King's Bench.

by our writ, and by the judgment of the ſame court, recovered againſt *Michael A.* of the pariſh of St. *Paul Covent-Garden* in the county of *Middleſex*, gent. two hundred pounds of debt, and ſixty ſhillings for his damages which he had ſuſtained as well by occaſion of the detaining of that debt, as for his coſts and charges by him about his ſuit in that behalf expended; whereof the ſaid *Michael* was convicted, as by the inſpection of the record and proceedings thereon, which we lately cauſed to come in our court before us, for certain cauſes concerning error, appears to us from record: And now, on behalf of the ſaid *Marmaduke* in our ſaid court before us, we have been informed, that although the ſaid judgment be given in form aforeſaid, yet execution for the ſaid debt and damages ſtill remains to be made to him; whereupon the ſaid *Mardaduke* hath prayed us, that a proper remedy may be provided for him in this caſe: And we, being willing that what is juſt ſhould be done on this occaſion, command you, that by good and lawful men of your bailiwic, you make known to the ſaid *Michael* that he be before us, from the day of

whereſoever we ſhall then be in *England*, to ſhew if any thing he has or knows to ſay for himſelf, why the ſaid *Marmaduke* ought not to have his execution againſt him for the ſaid debt and damages, according to the force, form and effect of the ſaid recovery, if he ſhall think it expedient, *&c.* and further to do and receive what our ſaid court before us ſhall then and there conſider of him in this

this behalf; and have you there the names of thoſe by whom you ſhall make known to him, and this writ. Witneſs, &c.

Another on a judgment in an inferior court.

GEORGE the third, by the grace of God, of *Great Britain*, *France* and *Ireland* king, defender of the faith, &c. To the mayor and bailiffs of the town of *Northampton* greeting: Whereas *Peter L.* lately in our court, of the town aforeſaid, before you without our writ, and by the judgment of the ſame court, recovered againſt *Francis S.* eſq; thirty-ſeven pounds, ſix ſhilling and ninepence, for his damages which he ſuſtained as well by occaſion of the not performing certain promiſes and undertakings lately made to the ſaid *Peter L.* by the ſaid *Francis S.* as for his coſts and charges by him about his ſuit in that behalf expended, whereof the ſaid *Francis S.* was convicted, as by inſpection of the record and proceedings thereupon, which we have lately cauſed to come in our court before us, for certain cauſes concerning error, appears to us of record: And now, on the behalf of the ſaid *Peter L.* in our ſaid court before us, we have been informed, that although the ſaid judgment was given in form aforeſaid, yet execution for the ſaid damages ſtill remains to be made to him; whereupon the ſaid *Peter L.* hath humbly intreated us for a proper remedy to be provided for him in this behalf; And we, being willing that what is juſt ſhould be done in this behalf, command you, that by good and lawful men of the bailiwic of the town aforeſaid you make

make known to the ſaid *Francis S.* that he be before us from the day of
whereſoever, *&c.* to ſhew, if any thing he has or knows to ſay for himſelf, why the ſaid *Peter L.* ought not to have his execution againſt him for the ſaid damages, according to the force, form and effect of the ſaid recovery, if he ſhall think it expedient, *&c.* and further to do and receive what our ſaid court before us ſhall then and there conſider of him in this behalf; and that you have there the names of thoſe by whom you ſhall make known to him, and this writ. Witneſs, *&c.*

Non proſs *after two* ſci. fa's *in error on ejectment.* Lilly's Entr. 224, 236. Hanſ. Entr. 458.

And afterwards, to wit, on *Wedneſday* next after three weeks, from the day of the Holy *Trinity* in this ſame term, before our lord the king at *Weſtminſter* the ſaid *George Davey* comes in his proper perſon, and ſays, that execution of the ſaid judgment ſtill remains to be made to him; therefore he prays the writ of our lord the king to be directed to the ſheriff of the ſaid county of *Surrey*, to warn the ſaid *Elizabeth* to be before our lord the king, whereſoever, *&c.* to ſhew if any thing ſhe has or knows to ſay for herſelf, why the ſaid *George* ought not to have his execution thereof againſt her, as well of the poſſeſſion of the ſaid term yet to come of and in the ſaid tenements, with the appurtenances, as of his damages, coſts and charges, according to the force, form and effect of the ſaid recovery; and it is granted to him, *&c.* By which it is commanded to the ſheriff of the county of *Surrey*, that by good and lawful men

Firſt ſci. fa.

men of his bailiwic he make known to the ſaid *Elizabeth*, that ſhe be before our lord the king from the day of St. *Michael* in three weeks, whereſoever, &c. to ſhew in form aforeſaid, if, &c. And further, &c. The ſame day is given to the ſaid *George*, &c. At which day, before our lord the king at *Weſtminſter*, the ſaid *George* comes in his proper perſon; and the ſheriff of the ſaid county of *Surrey*, to wit, *A. B.* eſq; returns that the ſaid *Elizabeth Arnold* has nothing in his bailiwic by which he can make known to her, nor is ſhe found in the ſame, and ſhe does not come: Therefore, as before, it is commanded to the ſheriff of *Surrey*, that by good, &c. he make known to the ſaid *Elizabeth*, that ſhe be before our lord the king on the octave of St. *Martin*, whereſoever, &c. to ſhew in form foreſaid, if, &c. And further, &c. The ame day is given to the ſaid *George*, &c. t which day, before our lord the king at *Weſtminſter*, the ſaid *George* comes in his proer perſon: And the ſheriff of the ſaid coun- of *Surrey*, to wit, the ſaid *A. B.* eſq; likeſe returns, that the ſaid *Elizabeth* has noing in his bailiwic by which he can make own to her, nor is ſhe found in the ſame; d the ſaid *Elizabeth*, although on the fourth y of the plea ſolemnly required, came not, t made default; and upon this the ſaid *eorge* ſays, that the ſaid *Elizabeth* hath not t aſſigned error or errors in the ſaid reord and proceedings: Therefore a day is ven to the ſaid parties before our lord the ng at *Weſtminſter* until *Wedneſday* next af- fifteen days from the day of St. *Martin*,

Returned nihil.

Alias ſci. fa.

Nihil *returned.*

Day appointed to aſſign errors.

tin, to wit, to the ſaid *Elizabeth* to aſſign error or errors in the ſaid record and proceedings, *&c.* At which day, before our lord the king at *Weſtminſter*, the ſaid *George* comes in his proper perſon, and the ſaid *Elizabeth* at that day ſolemnly demanded came not, but likewiſe made default; nor has ſhe further proſecuted the ſaid writ of error againſt the ſaid *George*: It is therefore conſidered, that the ſaid *Elizabeth* be in mercy, and that the ſaid *George* have therefore his execution againſt the ſaid *Elizabeth*, as well of the poſſeſſion of his ſaid term yet to come of and in the ſaid tenements with the appurtenances, as of his ſaid damages, coſts and charges, according to the force, form and effect of the ſaid recovery, *&c.* And it is further conſidered, that the ſaid *George* recover againſt the ſaid *Elizabeth* five pounds and ten ſhillings adjudged to the ſaid *George* by the court of our lord the king now here, according to the form of the ſtatute, for his damages, coſts and charges, which he ſuſtained by occaſion of the delaying the execution of the ſaid judgment, by pretence of proſecuting the ſaid writ of error; and that the ſaid *George* likewiſe have thereupon execution, *&c.*

Plaintiff in error makes default.

Judgment.

Coſts.

Vide poſtea more precedents.

Audita

Audita querela.

AN *audita querela* is a new kind of action, and commenced only 10 *E.* 3. it doth not lie where there is any other remedy at law for the plaintiff, either by plea or otherwiſe. 1 *Raym.* 89. 1 *Inſt.* 290. *b.*

In what caſe an audita querela *lies.*

Any perſon bound by ſtatute or recognizance, or againſt whom a judgment is given, that hath a releaſe, or other matter in writing, or any matter in fact whereby he ought to be diſcharged and releaſed, but hath no day in court to plead the ſame, ſhall have this writ, which iſſues out of the *Chancery*, directed to the judge of this court, or of the *Common Pleas*; and is in the nature of a commiſſion to the judges to call the parties before them, hear the complaint, and to do right.

If on a judgment in this court, and a writ of error brought thereon in the *Exchequer* chamber, the plaintiff in the original action brings debt on the judgment, and recovers a judgment thereupon, and afterwards the firſt judgment is reverſed on the writ of error, an *audita querela* may be brought for relief againſt this ſecond judgment.

If in a debt on a judgment, judgment be obtained, and the firſt judgment be afterwards reverſed on writ of error, audita querela *lies.*

If after judgment againſt the bail the judgment againſt the principal be reverſed or ſatisfied, the bail may have an *audita querela.*

It lies for bail after the reverſal of the judgment againſt the principal.

For bail if no ca. ſa. againſt the principal in his life-time.

Judgment in debt againſt *Halloway*, who died, not having ſatisfied the debt or rendered his body; a *ſcire facias* iſſued againſt the bail, and after two *nihils* execution was awarded, whereupon they brought an *audita querela*, and becauſe no *capias ad ſatisfaciend.* had been awarded againſt *Halloway*, they had judgment. *Hil.* 40 *Eliz. B. R. Hobs* v. *Tedcaſtle*, *Cro. Eliz.* 597.

Aſſault againſt two, plaintiff releaſes one, audita querela *lies.*

If an action be brought againſt *A.* for a treſpaſs committed by him *ſimul cum B.* and judgment be obtained thereupon, and afterwards the plaintiff releaſe *B.* an *audita querela* lies for *A.* on this releaſe.

It lies for one ſet at large on an execution, and taken again.

If one be taken in execution, and afterwards ſet at liberty by the plaintiff, and then taken again upon the ſame execution, he may bring his *audita querela* to be enlarged; for the execution was diſcharged, and being once diſcharged is diſcharged for ever, and ſuppoſes a ſatisfaction.

It lies upon a releaſe after verdict, and before day in bank.

If at *Niſi prius* in treſpaſs a verdict be found for the plaintiff, and damages aſſeſſed, and before the day in bank the plaintiff releaſe to the defendant all actions and demands, and afterwards prays judgment, and ſues execution thereupon, the defendant upon that releaſe ſhall have an *audita querela.*

Where an audita querela *lies not.*

An *audita querela* lies not after judgment upon a matter which might have been pleaded before; but where the party was condemned, and had no day in court to plead it, an *audita querela* lies. *Cro. Eliz.* 25. *Antea.*

After award of execution on a ſci fa. *and* ſci. feci *re-*

Where a defendant had matter which might have been pleaded to a *ſcire facias*, and has loſt the benefit of that by an award of execution

execution upon a *ſcire feci* returned, he is eſtopped for ever, and can never have an opportunity or means to let himſelf in to take advantage of that matter; but where it is an award on two *nihils* returned, he may relieve himſelf by *audita querela*; and the court will ſave him that trouble, and relieve him, upon motion, unleſs the ground of his *audita querela* be a releaſe, or ſome ſuch matter of fact as may be proper to be tried.

turned, defendant cannot have advantage of matter pleadable to that; otherwiſe after two nihils.

No writ of *audita querela* for any cauſe whatever ſhall be allowed but in open court, and on motion. *Trin.* 9 *Jac.* 1.

No audita querela *to be allowed but in open court.*

An *audita querela* is no *ſuperſedeas*, and therefore execution may be taken out, unleſs a *ſuperſedeas* be ſued forth; and if the *audita querela* be founded on a deed, it muſt be proved in court before a *ſuperſedeas* ſhall be granted.

Audita querela *is no* ſuperſedeas.

If an *audita querela* be founded upon a record, or the party be in cuſtody, the proceſs upon it is a *ſcire facias*; but if it be grounded on a matter of fact, or the party be not in cuſtody, and only brought *quia timet*, the proceſs is a *venire* and diſtreſs infinite.

Proceſs in audita querela.

One in execution may be bailed on an *audita querela*, but muſt procure four perſons to become bail for him.

Bail on audita querela.

Bail ſhall not be taken on an *audita querela* but in open court, and by ſpecial motion. *Trin.* 9 *Jac.* 1.

No bail taken on audita querela *but in court and on motion.*

Eagle being taken in execution upon a judgment on a *ſcire facias* againſt him as bail for *Ogle*, brought an *audita querela* ſuggeſting his infancy, and the writ being brought into

An infant bail relieved on audita querela.

court he appeared *in propria perſona*, and moved that he might be inſpected and his witneſſes examined; his mother ſwore that he was at that time twenty years old and no more, and a maid ſervant gave circumſtantial evidence to the ſame purpoſe; whereupon it was moved that he might be bailed. *Curia:* 'Tis matter of diſcretion either to admit him to bail, or to refuſe him, he being in execution; but if he had brought his *audita querela* before he had been taken in execution, he muſt have had a *ſuperſedeas* of courſe. The court requiring the evidence to be ſtrengthened by a copy of the regiſter of his birth, he appeared again in *Michaelmas* term in cuſtody, and a copy of the regiſter being produced and proved, and the mother and the maid ſervant giving the ſame evidence, as before, he was diſcharged. *Trin. 5 W. & M. B. R. Loyd* v. *Eagle, Carth.* 278.

Of admitting one in execution to bail on an audita querela.

The form of the bail-piece on an *audita querela*.

The form of the bail-piece.

Hilary term in the eighth year of king *George* the third.

Marſh, *(to wit.)* J. L. *of*, &c. *is delivered on bail to proſecute with effect a writ of* audita querela *brought by him to be diſcharged of and from a judgment given againſt him in the court of our lord the king, before the king himſelf, at the ſuit of one* J. W. *for five hundred pounds of debt, and for damages, coſts and charges to*

J. D. *of*, &c. *gent.*
F. J. *of*, &c. *gent.*
J. B. attorney. G. H. *of*, &c. *gent.*
and
J. K. *of*, &c. *gent.*

The condition of the recognizance.

You ſeverally acknowledge yourſelves to owe *J. W.* the ſum of one thouſand pounds.

Upon condition that the ſaid *J. L.* ſhall proſecute his ſuit with effect, and if he ſhall be convicted, or make default in the premiſſes, that he ſhall pay the condemnation money, or you ſhall do it for him.

Are you content?

I apprehend that the plaintiff in the *audita querela* cannot be ſurrendered in diſcharge of

his bail, though the contrary appears by ſeveral entries I have ſeen.

Entry of the ſurmiſe and recognizance on a writ of audita querela.

Our lord the king ſent to his juſtices, aſſigned to hold pleas before the king himſelf, his writ cloſe, in theſe words, to wit, *George* the third, *&c.* (and ſo recite the whole writ of *audita querela.*

Defendant brought in cuſtody to the bar of the court,

Afterwards, to wit, on the day of in that ſame term before our lord the king at *Weſtminſter*, the ſaid *T. S.* comes in his proper perſon, being brought to the bar here, under the cuſtody of eſq; marſhal of the *Marſhalſea* of our lord the king, and ſays, that he ought not to be farther detained in the ſaid priſon by pretence of the ſaid execution, becauſe he ſays, that after the ſaid judgment was given againſt him the ſaid *T. S.* at the ſuit of the ſaid *T. H.* for the debt and damages aforeſaid, he the ſaid *T. S.* (on ſuch a day) in the year of the reign of our ſaid ſovereign lord *George* the third, now king of *Great Britain*, *&c.* in the court of our ſaid lord the king, before the king himſelf, the ſaid court being then at *Weſtminſter* in the county of *Middleſex*, rendered himſelf to the priſon of the marſhal of the *Marſhalſea* of our ſaid lord the king for the ſaid debt and damages; and he the ſaid *T. S.* then and there preſent in the ſaid court, was by the ſaid court of our ſaid lord the king committed to the cuſtody of then marſhal of the *Marſhalſea* of our ſaid lord the king, before the king himſelf, in execution for the ſaid debt and damages, there to remain until the ſaid *T. H.* ſhould

ſurmiſes that he rendered himſelf in execution,

and was committed to the cuſtody of the marſhal.

ſhould be fully ſatisfied of the debt and damages aforeſaid: And afterwards, to wit, on the day of then next enſuing, the ſaid [the marſhal] permitted him the ſaid *T. S.* being in priſon in execution for the ſaid debt and damages as aforeſaid, to eſcape out of the ſaid priſon, and to go at large; whereby the ſaid *T. S.* was diſcharged from the ſaid execution; and the ſaid *T. S.* being diſcharged from the ſaid execution in form aforeſaid, the ſaid *T. H.* afterwards, to wit, on the day of in the year aforeſaid, at *B.* in the county aforeſaid, cauſed him the ſaid *T. S.* to be taken by pretence of the ſaid judgment, and to be committed to the cuſtody of the marſhal of the *Marſhalſea* of our ſaid lord the king, in execution for the ſaid debt and damages; and the ſaid *T. S.* prays that he may be diſcharged from the ſaid priſon, and of the ſaid debt and damages, *&c.* But becauſe it is unknown to our court before us, whether the allegation of the ſaid *T. S.* be true or no, it is commanded to the ſheriff of *Middleſex*, that by good and lawful men, *&c.* he make known to the ſaid *T. H.* that he be before our lord the king from the day of *Eaſter* in fifteen days, whereſoever he ſhall then be in *England*, to ſhew, if any thing he has or knows to ſay for himſelf, why the ſaid *T. S.* ought not to be diſcharged and delivered from the ſaid priſon, and of the ſaid debt and damages, *&c.* and further to do and receive what, *&c.* The ſame day is given to the ſaid *T. S.* *&c.* And upon this came *E.* and *B.* bail in their proper perſons, and be-

Voluntary eſcape by the marſhal.

Sci. fa. awarded.

Delivered on bail.

came bail for the ſaid *T. S.* to have his body before our lord the king at the ſame time, *&c.* and ſo from day to day, until, *&c.* each of the ſaid bail under the penalty of 10*l.* which ſaid ſums the ſaid bail acknowledged, and each of them by himſelf acknowledged to be made of their and each of their lands and chattels, and to be levied to the uſe of the ſaid *T. H.* if it ſhould happen that the ſaid *T. S.* ſhould not perſonally appear on the premiſſes at any day appointed, or to be appointed for him by the court of our lord the king now here, or ſhould not proſecute his ſaid writ with effect; or if it happen that judgment be given for the ſaid *T. H.* againſt the ſaid *T. S. &c.* he do not render himſelf on that occaſion to the priſon of the marſhal of the *Marſhalſea* of our ſaid lord the king, before the king himſelf, *&c.* or do not pay the ſaid 10*l.* to the ſaid *T. H.* And be it known, that the writ of our lord the king in this ſame term, before our ſaid lord the king at *Weſtminſter*, is delivered of record to the under ſheriff of the county of *Middleſex* preſent here in court, to be executed in form of law, *&c.* At which day before our lord the king at *Weſtminſter* the ſaid *T. S.* came in his proper perſon, and the ſheriff returned, that he had made known to the ſaid *T. H.* by *J. D.* and *J. F.* good, *&c.* which ſaid *T. H.* according to the notice given him in his behalf, on the fourth day of the plea, being ſolemnly demanded, alſo came in his proper perſon, and thereupon prays a day to imparle; and it is given to him, *&c.* And upon this a day is given to the ſaid parties to be

Return ſcire feci.

be before our lord the king, on the morrow of the Holy *Trinity*, whereſoever, *&c. to wit*, to the ſaid *T. H.* to imparle, and then to anſwer, *&c.* And upon this came, *&c.* and became bail to have the body of the ſaid *T. S.* before our lord the king on the ſaid morrow of the Holy *Trinity*, whereſoever, *&c.* and ſo from day to day, until, *&c.* each of the ſaid bail body for body, *&c.*

Entry of the recognizance on an audita querela *in another manner.*

And upon this, before our lord the king at *Weſtminſter*, came *N. B. R. R. S. B.* and *R. T.* in their proper perſons, and became bail to have the body of the ſaid *R. M.* before our lord the king at the ſame time, and ſo from day to day, until, *&c.* and that the ſaid *R. M.* ſhall proſecute his ſaid writ of *audita querela* with effect, each of the ſaid bail under the penalty of the ſeveral condemnations aforeſaid: And further, if it happen that judgment be thereupon given againſt the ſaid *R. M.* then the ſaid manucaptors grant, and each of them for himſelf grants, that the ſaid ſeveral debts and damages be made of their and each of their lands and chattels, and be levied to the uſe of the ſaid *R. H.* if it happen that the ſaid *R. M.* does not ſatisfy him the ſaid ſeveral debts and damages.

Judgment on an audita querela *after a verdict on a trial at bar.*

From which day the ſaid jury between the ſaid parties on the plea aforeſaid, were thereupon reſpited between them before our lord the king, until on the morrow of the Holy *Trinity* then next enſuing, whereſoever, *&c.* for default of the jurors, *&c.* on which morrow of the Holy *Trinity* before our lord the king at *Weſtminſter* came as well the ſaid *J. C.* in his proper perſon, as the ſaid *T. S.* by

by his atttorney aforesaid; and the jurors of the said jury being demanded likewise came, who to say the truth of and upon the premisses being chosen, tried and sworn, say upon their oaths, that the said *E. P.* esq; late sheriff of the county of *C.* permitted the said *J. C.* to escape and go at large out of the said prison in manner and form as the said *J. C.* in his discharge of the said execution has alledged: Therefore it is considered, that the said *T.* be intirely barred from all execution whatsoever by pretence of the said recovery; and that the said *J. C.* be discharged from the said execution, *&c.*

Another form. It is therefore considered, that the said plaintiff be discharged from the execution of the said debt and damages, and be delivered out of the prison, in which he is detained on that account, *&c. Mich.* 4 *&* 5 *Jac.* 1. *Rot.* 117. *Dyer* 194.

Another form. It is therefore considered, that the said *G.* have no further execution against the said *V.* or against any of the lands, tenements, goods or chattels of the said *V.* by pretence of the said recognizance; and that the said *G.* be intirely barred from having any execution thereupon by pretence of the said recognizance; and the said *V.* and all his lands, tenements, goods and chattels be intirely discharged from such execution, *&c.*

No costs or damages. No damages or costs can be given to a plaintiff on an *audita querela.* See *Dyer* 194.

As to restitution upon a recovery in an audita querela. Whether the plaintiff in an *audita querela*, if it be found for him, shall have restitution, or no, there being no such thing mentioned in

in the judgment, ſee 1 *Sid.* 74. *pl.* 4. 1 *Keb.* 245. *pl.* 4. 260. *pl.* 39.

If the plaintiff in an *audita querela* be non-ſuited, though he may have a new writ of *audita querela*, he ſhall have no *ſuperſedeas* to ſtay execution. *If plaintiff nonſuited, can have no new* ſuperſedeas.

Per curiam: Where an *audita querela* is brought by a perſon actually in execution, or if at large, and he founds his writ upon ſome deed of the other party, in both theſe caſes a *ſcire facias* is the proceſs. *Proceſs in* audita querela.

But where it is brought by a perſon at large, and upon a bare ſuggeſtion of matter of fact, there the only proceſs is a *venire facias*, and upon that a diſtreſs infinite. *Paſch.* 6 *W. & M. B. R. Clerke* v. *Moor*, *Carth.* 303. *Salk.* 92.

Judgment for 500 *l.* againſt the anceſtor who pays it, and dies, not having taken a releaſe or deed upon the payment. Reſolved, the heir may maintain *audita querela* upon this payment, though no deed or ſpecialty. *Drake* againſt *Ward*, *Hil.* 20, 21 *Car.* 2. 2 *Keb.* 455. *Heir may maintain* audita querela *on a judgment paved by his anceſtor.*

Adminiſtrator recovers in trover, counting of his own poſſeſſion; but before execution adminiſtration is revoked, and the defendant brings *audita querela*; and adjudged it lay, for though he bringing it of his own poſſeſſion need not name himſelf adminiſtrator, yet the damages recovered are aſſets; ſo where baron and *feme* executrix recover, the *feme* dies before execution, the baron ſhall not have *ſcire facias*. 1 *Cro.* 208, 227, 464. *Turner* and *Davis*, entered *Paſ.* 22 *Car.* 2. *Ro.* 576. 1 *Danv. Abr.* 636. *p.* 19. 2 *Saund.* 148. 1 *Mod.* 62. 2 *Keb.* 668. Audita querela *on a judgment recovered by an adminiſtrator, the adminiſtration being revoked.*

Battery

Audita querela *on a judgment, plea* nul tiel record, *the judgment not being entered, ordered that it should be entered by a certain time, or not at all.*

Battery againſt the two defendants, verdict at the aſſiſes for the plaintiff, who after the *Niſi prius*, and before the day in bank, in conſideration of 10 *l.* executes a releaſe to *Baker* one of the defendants; *Meredyth* the other defendant, to have advantage of the releaſe after the day in bank, and before judgment entered, ſued out an *audita querela*, put in bail, and declared as of the judgment entered; the plaintiff in the original action pleads *nul tiel record*; the plaintiff in the *audita querela* moved, that the plaintiff in the original action might bring in the *poſtea* and enter judgment, or that *Meredyth* ſhould do it for him. *Per cur'*: Let the plaintiff in the original action enter his judgment within ſuch a time as of the day in bank, or let it never be entered, and then let the ſuit on the *audita querela* ſtay. *Ranfere* againſt *Meredyth* and *Baker*, *Paſ.* 26 *Car.* 2. & 1 *Mod.* 111.

Where the court gave relief without an auditaquerela.

One in *Northumberland* lent money, and for ſecurity accepted a judgment, the money was paid within a day or two after it became due, and the party gave an acquitance, and promiſe to acknowledge ſatisfaction; and this was proved before the ſecondary; yet the plaintiff took the defendant in execution, and he remains in priſon. *Wild* and *cur.* (*Twiſden* abſent) The proper remedy is by *audita querela*; but let the plaintiff appear here the next term to ſhew cauſe why he ſhould not acknowledge ſatisfaction on record. *Anonymus*, *Mich.* 29 *Car.* 2.

Scire facias *teſte before* auditaquerela.

The plaintiff taken in execution brings *audita querela*, teſte 21 *Nov.* A *ſcire facias* iſſues

iſſues teſte 6 *November*. The defendant appears and demurs, and moves for cauſe, that the teſte of the *ſcire facias* is before the *audita querela*; *non allocatur*; for here the *ſcire facias* being but to compel the party to appear, and anſwer the *audita querela*, the appearance has helped the defects of the proceſs; but upon a *ſcire facias* upon a judgment it may be otherwiſe, becauſe another judgment is to be grounded upon it; and if ſuch a *ſcire facias* be teſted out of term it is ill. *Vaughan* againſt *Lloyd*, *Hil.* 20, 21 *Car.* 2.

The *exoneretur* which had been ordered to be entered, was *not actually* entered on the bail-piece, (by the omiſſion of the proper officer who ought to have entered it:) But the plaintiff himſelf was *appriſed* of the ſurrender; though his attorney ſwore that *he* (the attorney) had no notice of it.

The plaintiff's attorney, not being appriſed of the ſurrender of the principal, ſued out *ſcire facias's* againſt the bail; who paid the money: But they were ſued out into *London* (where the original cauſe of action was;) and *not into Middleſex*, where the ſurrender was made, and where the bail-piece remained.

The bail had applied, upon both theſe irregularities, (*viz.* 1ſt, the plaintiff's *being appriſed* of the ſurrender and order of the court; and ſecondly the *ſcire facias's* not being ſued out into *Middleſex*;) that the *ſcire facias's* might be ſet aſide for irregularity, with coſts; and the money reſtored.

The court was clear on *both* points, that the *ſcire facias's* were *irregularly* ſued out; and

and granted the motion, by making the rule abſolute, as prayed; excepting only, that they omitted the coſts; merely becauſe it would have been to no purpoſe to have ordered them, as the plaintiff himſelf (who appriſed of the ſurrender) was gone abroad; and the attorney, (not being appriſed of it) had not acted with any ill deſign or intention to oppreſs. *Bond* v. *Iſaac*, *Bur. Rep.* 409.

Wager of law.

Where defendant may wage his law.

WHERE an action of debt is brought againſt one upon ſome ſimple contract between the parties without deed or record, there the defendant may wage his law by ſwearing in court in the preſence of his compurgators, that he owes not the money, nor any peny thereof, in manner and form as the plaintiff hath declared.

Wager of law lies not in debt on a by law, nor any action where a wrong is ſuppoſed.

On debt for the penalty of a by-law made by a corporation, the defendant ſhall not wage his law, becauſe it is founded on the wrong of the party, in not ſubmitting to the order of the government of the corporation, and ariſes from the defendant's contempt and diſobedience; and in ſuch caſes no wager ought to be allowed; ſo in debt for an eſcape, for it ſuppoſes a wrong; ſo in debt for ſubſtraction of tithes; ſo it is in debt on a *devaſtavit*.

No

No wager lies but where the debt ariſes from a ſimple contract that is ſecret, and not where the action is founded on any thing that is notorious. In account, if the receipt was by the hands of the defendant, he may wage his law, not if by the hands of a third perſon; but in bailment, though by the hands of a third perſon, the defendant may wage his law, becauſe the bailment is not traverſable, but the detainer and the re-delivery may be private.

Wager lies in account, if received of the plaintiff, not of a ſtranger.

In debt on an arbitrament where the ſubmiſſion is by parol, the defendant may wage his law, for the ſubmiſſion may be ſecret.

In debt ſur arbitrament.

In debt for an amerciament in a court baron, the defendant may wage his law, becauſe the matter is of ſmall value, which concerns the lord only, and tranſacted in *pais*, which might be without his knowledge; but in debt on a judgment in a court-baron, the defendant cannot wage his law, for the judgment could not be but by confeſſion or verdict.

In debt for an amerciament in a court-baron.

But not on a judgment in a court-baron.

In debt for rent on a leaſe parol the defendant cannot wage his law, becauſe his occupation is notorious; and ſo it is in account againſt a bailiff for the ſame reaſon.

Lies not in debt for rent.

In debt by a gaoler againſt his priſoner for meat and drink, the defendant cannot wage his law, becauſe the defendant is in durance, and the plaintiff cannot take ſecurity from him for repayment, for a bond will be void, and he muſt be content with a promiſe. *Salk.* 683, 684.

Nor in debt by a gaoler for meat and drink.

Suſſex,

Declaration against a bailiff by the hands of the plaintiff. Lill. Ent. 467.

Suſſex, to wit, *Thomas Delves* complains of *William Gunner*, being in the cuſtody of the marſhal of the *Marſhalſea* of our lord the king before the king himſelf, of a plea, that he render him reaſonable account from the time he was bailiff of the ſaid *Thomas*; for that, *to wit*, that whereas the ſaid *William Gunner* was bailiff of the ſaid *Thomas* at *Eaſtboadly* in the county aforeſaid, from the third day of *March* in the year of our lord until the thirtieth day of the ſame month of *March*, and during that time had received of the goods, wares and merchandizes of the ſaid *Thomas* by the hands of the ſaid *Thomas*, the proper goods, wares and merchandizes following, *to wit*, five bags of hops containing twelve hundred weight, two quarters and twenty-two pounds of hops to the value of forty nine pounds and ten ſhillings of lawful money of *Great Britain*, to merchandize and diſpoſe of for the ſaid *Thomas*; and to render the ſaid *Thomas* reaſonable account thereof, when he ſhould be thereunto required: Nevertheleſs the ſaid *William*, although often required, *&c.* has not rendered the ſaid *Thomas* reaſonable account thereof, but to render him the ſame hath altogether refuſed and ſtill doth refuſe: Wherefore the ſaid *Thomas* ſaith he is the worſe, and hath damage to the value of one hundred pounds: and thereupon he brings ſuit, *&c.*

Plea in bar, that he never was bailiff.

And the ſaid *William*, by his attorney, comes and defends the force and injury, when, *&c.* and ſays, that

that he never was bailiff of the ſaid *Thomas*, of the goods, wares and merchandizes aforeſaid of the ſaid *Thomas*, nor of any parcel thereof, in form as the ſaid *Thomas* has above declared againſt him; and this he is ready to defend againſt him and his ſuit, as the court of our lord the king here ſhall conſider: Therefore it is conſidered, that the ſaid *William* wage to him thereof his law, himſelf being the twelfth hand, pledges of the law *John Den* and *Richard Fen*, and come with his law here * on *Thurſday* next after three weeks from the day of St. *Michael:* And it is told to the ſaid attorney of the ſaid *William*, that he have then here at the ſame day the ſaid *William* in his proper perſon, to perfect his ſaid law. *Judgment that the defendant wage his law.*

Friday next after three weeks from the day of St. *Michael*, in the year of, *&c.*

Delves againſt *Gunner* } It is ordered, that a *non proſ.* be recorded on the motion of

And the ſaid *D. E.* [the defendant] defends the force and injury, when, *&c.* and ſays, that he does not owe the ſaid *A. B.* [the plaintiff] the ſaid hundred pounds, nor any penny thereof, in manner and form as the ſaid *A. B.* has above complained againſt him; and this he is ready to defend againſt the ſaid *A. B.* and his ſuit, in ſuch manner as the court of our lord the king here ſhall conſider: It is therefore conſidered, that the ſaid *D. E.* wage to him his law, himſelf being the *Nil debet per legem.* *Judgment that the defendant wage his law.*

* No ſuch return now, *p* 63.

twelfth hand, and come with his law before the lord the king at *Weſtminſter*, on next after pledges of the law *John Doe* and *Richard Roe:* And it is told to the attorney of the ſaid *D. E.* that he have before our lord the king at the day the ſaid *D. E.* in his proper perſon, to perfect his law thereupon, *&c.* The ſame day is given to the ſaid *A. B.* at the ſame place: At which day before our lord the king at *Weſtminſter* came as well the ſaid *A. B.* by his attorney aforeſaid, as the ſaid *D. E* in his proper perſon; and upon this the ſaid *D. E.* perfected thereof his law, himſelf being the twelfth hand, as he has above waged it. It is therefore conſidered, that the ſaid *A. B.* take nothing by his ſaid bill; but for his falſe complaint be in mercy, and that the ſaid *D. E.* go thereupon without day, *&c.*

Defendant perfects his law.

Judgment thereupon.

When plaintiff non-proſs'd.

If the plaintiff be nonſuited, then after the word (*Weſtminſter*) ſay, The ſaid *D. E.* came in his proper perſon; and the ſaid *A. B.* although at the ſame day ſolemnly demanded, came not, nor did he further proſecute his ſaid bill againſt the ſaid *D. E.* therefore, *&c.* Judgment and coſts, as is uſual in *non-proſſes.*

Defendant perfects his law inſtanter.

If the defendant wages his law *inſtanter*, then after the judgment for the defendant to wage his law, ſay thus: And upon this the ſaid *D. E.* prays that he may be admitted to wage his law thereupon inſtantly; and he is admitted, *&c.* and upon this the ſaid *D. E.* here in court perfected his law thereupon, *&c.* It is therefore, *&c.*

The method of waging law.

When the defendant wages his law, the ſecondary muſt appoint a day for him to appear in court to wage his law; and if he appears,

pears, he muſt bring with him ſix compurgators, who are to ſwear that they believe he ſwears true. The ſecondary muſt have the record in court, and the defendant muſt be ſet at the right corner of the bar, without the bar; then the ſecondary will aſk him if he will wage his law; if he anſwers he will, then the judges uſually admoniſh him and his compurgators, that they do not take a falſe oath; if they perſiſt, the ſecondary ſpeaks as follows:

Secondary. *A. B.* [the defendant] you owe *C. D.* [the plaintiff] 100*l.* (or as the caſe is) Why do you not pay him?

Defendant. I owe him nothing.

Secondary. Did you not buy, *&c.* (as in the declaration?)

Defendant. No.

Secondary. Will you take your oath of it?

Defendant. I will.

If the plaintiff does not appear on being called thrice by the cryer, he becomes nonſuited, and the defendant goes quit without taking his oath; but if he appears, the ſecondary bids the cryer call the plaintiff, and the defendant lay his right hand upon the book, and ſay after him thus: Hear, ye ju- *The oath.*
ſtices, that I owe not *C. D.* [the plaintiff] 100*l.* nor any penny thereof, in manner and form as he hath declared againſt me. So help me God, and the contents of this book.

And then his compurgators ſtanding behind him are called over, and each holds up his right hand, and then lay their hands upon

the book and ſwear, that they believe that what the defendant ſwore is true.

When the plaintiff may be nonſuited.

If the defendant wages his law *inſtanter*, the plaintiff cannot be nonſuited, but is for ever barred; but if a day is given, whether in the ſame term or another, the plaintiff is demandable, and may be nonſuited, and bring a new action.

The oath of the eleven, who are ſworn *de credulitate*, may be diſpenſed with by the plaintiff's aſſent. *Vide Magna Charta, c.* 28. 1 *Vent.* 4.

Of proceeding againſt members of parliament.

At what time action may be commenced againſt any intitled to privilege of parliament.

ANY perſon may commence and proſecute any action or ſuit in any of his majeſty's courts of record at *Weſtminſter, &c.* againſt any peer of this realm or lord of parliament, or againſt any of the knights, citizens and burgeſſes of the houſe of commons for the time being, or againſt their or any of their menial or other ſervants, or any other perſon intitled to the privilege of parliament, at any time from and immediately after the diſſolution or prorogation of any parliament until a new parliament ſhall meet, or the ſame be re-aſſembled, and from and immediately after any adjournment of both houſes of parliament for above the ſpace of fourteen days until both houſes ſhall meet and re-aſſemble; and the ſaid reſpective courts may, after ſuch diſſolution, prorogation or adjour-

ment, proceed to give judgment, *&c.* and award execution thereupon. *Stat.* 12, 13 *W.* 3. *c.* 3. *Stat.* 11 *Geo.* 2. *c.* 24.

Their perſons not to be arreſted.

Provided that the perſon of any of the knights, citizens and burgeſſes of the houſe, or any other perſon intitled to the privilege of parliament, is not ſubject to be arreſted during the time of privilege: Nevertheleſs, if any perſon having cauſe of action or complaint againſt any peer of this realm, or lord of parliament, ſuch perſon after any diſſolution, prorogation or adjournment as aforeſaid, or before any ſeſſions of parliament, or meeting of both houſes as aforeſaid, may have ſuch proceſs out of his majeſty's courts of *King's Bench*, *&c.* againſt ſuch peer or lord of parliament, as he might have had againſt him out of time of privelege; and if any perſon having cauſe of action againſt any of the ſaid knights, citizens or burgeſſes, or any other perſon intitled to privilege of parliament after any diſſolution, prorogation or adjournment as aforeſaid, or before any ſeſſions of parliament, or meeting of both houſes as aforeſaid, ſuch perſon may proſecute ſuch knight, citizen or burgeſs, or other perſon intitled to the privilege of parliament, in his majeſty's courts of *King's Bench*, *&c.* by ſummons and diſtreſs infinite, or by original bill and ſummons, attachment and diſtreſs infinite, thereupon to be iſſued out of any of the ſaid courts of record, which the ſaid reſpective courts are impowered to iſſue againſt them, or any of them, until he or they ſhall enter a common appearance, or file common bail to the plaintiff's action, according to

In what manner to proceed againſt a peer,

Or member of the houſe of commons, &c.

the courſe of each reſpective court. *Stat.* 12, 13 *W.* 3. *c.* 3.

Suit ſtayed by privilege not barred by ſtatute of limitations.

Where any plaintiff ſhall, by reaſon or occaſion of privilege of parliament, be ſtayed or prevented from proſecuting any ſuit by him commenced, ſuch plaintiff ſhall not be barred by any ſtatute of limitations, or nonſuited, diſmiſſed, nor his ſuit diſcontinued for want of proſecution of his ſuit, but ſhall from time to time upon the riſing of the parliament be at liberty to proceed to judgment and execution. *Same ſtat.* and ſee *ſtat.* 2, 3 *Ann. c.* 18.

Summons againſt a member of parliament.

GEORGE the ſecond, by the grace of God, of *Great Britain*, *France* and *Ireland* king, defender of the faith, *&c.* To the ſheriff of *Middleſex* greeting: We command you, that you cauſe to be ſummoned *P. W.* eſq; he having privilege of parliament, that he be before us at *Weſtminſter* on next after to anſwer *R. R.* in a plea of treſpaſs on the caſe to the damage of the ſaid *R.* of one hundred pounds; and have there then this writ. Witneſs *William* Lord *Mansfield* at *Weſtminſter*, the day of in the year of our reign.

Lee.

See Colonel *Pitt*'s caſe, *Forteſ.* 159. *Com.* 444.

Rules

Rules of court made in his preſent MAJESTY'S *reign.*

TRINITY TERM 6 *Geo.* 3.

NOTICE is hereby given, That from and after the laſt day of this preſent *Trinity* Term, every rule to be made for the ſheriff of the county of *Middleſex*, and the ſheriffs of *London*, to return writs, or bring into court the body or bodies of any defendant or defendants, will be made for ſuch ſheriff and ſheriffs to return ſuch writs, and bring into court the body or bodies of ſuch defendant or defendants within four days next after ſervice thereof.

HILARY TERM 1768.

Friday *next after the Octave of the Purification of the Bleſſed Virgin* Mary *in the eighth year of king* George *the third.*

WHEREAS the habitations of many attornies, practiſing in this court, reſident in and near the cities of *London* and *Weſtminſter*, are often very difficult to be found, whereby it is impracticable duly to ſerve them with notices, ſummonſes, orders, and rules, to the great delay of the proceedings in this court: For remedy whereof for the future, it is ordered, That the maſter ſhall forthwith cauſe to be prepared a proper alphabetical book for the purpoſes after men-

tioned, and that the ſame ſhall be publickly kept at the maſter's office in the *King's Bench* walks, to be there inſpected by any attorney or his clerk without fee or reward. And that every attorney practiſing in this court, and reſiding in *London* or *Weſtminſter*, or within ten miles of the ſame, ſhall, before the firſt day of the next term, enter in ſuch book (in alphabetical order) his name and place of abode, or ſome other proper place within the cities of *London* or *Weſtminſter*, where he may be ſerved with ſuch notices, ſummonſes, orders, and rules. And every attorney afterwards to be admitted, and practiſing and reſiding as aforeſaid, ſhall upon his admiſſion, make the like entry; and as often as any ſuch attorney ſhall change his place of abode, or the place where he may be ſo ſerved with notices, ſummonſes, orders, and rules, he ſhall make the like entry thereof in the ſaid book. And that all notices, ſummonſes, orders, and rules, which do not require a perſonal ſervice, ſhall be deemed ſufficiently ſerved on ſuch attorney, if a copy thereof ſhall be left at the place laſtly entred in ſuch book with any perſon reſident at or belonging to ſuch place. And if any ſuch attorney ſhall neglect to make ſuch entry, that then the fixing up of any notice, or the copy of any ſummons, order, or rule, for ſuch attorney in the ſaid maſter's office, ſhall be deemed a ſufficient ſervice, unleſs the matter be ſuch as ſhall require a perſonal ſervice. And it is further ordered, that a copy of this rule ſhall be publickly fixed up in the ſaid maſter's office, and that another copy thereof ſhall be

alſo

alſo fixed up in the chambers of each of the judges of this court. By the court,

COWPER.

N. B. It is expected that ſuch practiſers, who live remote from the *Temple*, ſhall add to the place of their abode where and with whom notices, ſummonſes, orders, rules, and other proceedings that do not require perſonal ſervice, may be left near any of the inns of court, or chancery.

GENERAL RULE.

Friday *next after three weeks from* Eaſter *day, in the eighth year of king* George *the third.*

IT is ordered, That for the future, when any priſoner ſurrenders or is ſurrendered to the cuſtody of the marſhal in diſcharge of his or her bail, under the commitment ſhall be added, in what ſtate the cauſe or cauſes ſtand at the time of ſuch ſurrender, if before declaration, the ſum ſworn to on the arreſt: If a declaration hath been filed or delivered, to the ſum ſworn ſhall be alſo added, declaration filed, or delivered, iſſue joined, or interlocutory judgment ſigned, as the caſe is. If after final judgment in debt, the debt and damages; in other caſes, the *quantum* of the damages. By the court,

COWPER.

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The End of the FIRST VOLUME.

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